

**2nd Annual Southern District of Texas
Consumer Bankruptcy Conference
January 16, 2025
1st Floor Jury Assembly Room – Bob Casey
Courthouse, 515 Rusk Ave. Houston Texas**



**January 16, 2025
Admission is free**

Earn up to 7.5 Hours of CLE Credit including 2.75 Hours of Ethics Credit Tx
Legal Specialization Credit Approved for Bankruptcy Law

2nd Annual Southern District of Texas Consumer Bankruptcy Conference
January 16, 2025
1st Floor Jury Assembly Room – Bob Casey
Courthouse, 515 Rusk Ave. Houston Texas

Live and in person at the following Divisions

Houston	1 st Floor Jury Assembly Room	Chief Bankruptcy Judge Rodriguez, Judge Lopez, and Judge Pérez
Laredo	Courtroom No. 2A	Judge Norman
Corpus Christi	A sign will be posted directing parties to the conference	Judge Isgur

Simultaneous Broadcast

For video, sign in to Chief Judge Rodriguez's Zoom link on

<https://www.zoomgov.com/j/1600160896>

Meeting ID 1600160896

Thursday, January 16, 2025

Presiding Officer:

Chief Bankruptcy Judge Eduardo V. Rodriguez

Schedule

8:00 a.m.

Meet and Greet

Includes light refreshments

8:15 a.m.

Welcoming Remarks

Nathan Ochsner, Clerk of Court

Chief District Judge Randy Crane

Chief Bankruptcy Judge Eduardo V. Rodriguez

8:30 a.m.

0.75 hours | .25 hour ethics

Chapter 7 Panel

Catching up with Chapter 7 Trustees: Answers to Frequently Asked Questions.

Moderator:

Alicia Barcomb, Office of the U.S. Trustee, Houston, TX

Panelists:

Chris Murray, Jones Murray, Houston, TX

Catherine Stone Curtis, McGinnis Lochridge, McAllen TX

Eva Englehart, Ross, Banks, May, Cron and Cavin, Houston, TX

9:15 a.m.

0.75 hours | .25 hour ethics

Behind the Bench

Things you should know, things you should avoid and practice tips.

Moderator:

Hon. Jeffrey P. Norman, U.S. Bankruptcy Judge

Panelists:

Sierra Thomas-Anderson, Case Manager for Judge Isgur

Tracey Conrad, Case Manager for Judge Norman

Jeannie Chavez, Case Manager for Chief Judge Rodriguez

Tyler Laws, Case Manager for Judge Perez

10:00 a.m.

Snack break

Freshly baked cookies provided

10:15 a.m.

0.75 hours

Small Business Debtor

A review of common issues with small business debtors, including valuation, income determination, cash collateral, and more.

Moderator:

Hon. Marvin Isgur, U.S. Bankruptcy Judge

Panelists:

Alex Chalk, Bryeans & Garcia, Houston, TX

Ravi Ratnala, Ratnala Law Firm, Houston, TX

Michael Hardwick, Office of Tiffany Castro, Houston, TX

11:00 a.m.

0.75 hours | .25 hour ethics

Chapter 13 Panel

Procedural updates, chapter 13 requirements, and practice tips

Moderator:

Azwar-Radi M. Rashid, Rashid Law Firm, Houston, TX

Panelists:

David Peake, Chapter 13 Trustee, Houston, TX

Yvonne Valdez, Chapter 13 Trustee, Corpus Christi, TX

Tiffany Castro, Chapter 13 Trustee, Houston, TX

11:45 a.m.

Grab a box lunch

12:00 p.m.

0.75 hours

Fireside chat with the Chief Judge for the 5th Circuit Court of Appeals

Join Chief Judge Rodriguez as he interviews our very own Fifth Circuit Court of Appeals Chief Judge Elrod and learn about the Fifth Circuit and important consumer bankruptcy issues facing lawyers today.

Moderator:

Hon. Eduardo V. Rodriguez, Chief Judge for U.S. Bankruptcy Court, SDTX

Guest Speaker:

Hon. Jennifer W. Elrod, Chief Judge for the U.S. Court of Appeals, Fifth Circuit

12:45 p.m.

0.75 hours | .75 hour ethics

Ethics in Consumer cases

Consumer lawyers wear many hats during the pendency of a case including that of a counselor, advocate, and problem solver. Discuss with this panel the ethical dilemmas when faced with incapacitated debtors, the substitution of counsel, and other challenging situations facing consumer attorneys.

Moderator:

Hon. Christopher M. Lopez, U.S. Bankruptcy Judge

Panelists:

Abe Limon, Limon Law Firm, Brownsville, TX 78520

Jessica Hanzlik, Office of the U.S. Trustee, San Antonio, TX

Kalvin Guyer, Law Clerk to Chief Judge Rodriguez, Houston TX

1:30 p.m.

0.75 hours | .5 hour ethics

Bankruptcy Petition Preparers and Pro Se Debtors

Unexpected issues, how to identify a BPP, and how an attorney could step in to help fix the case.

Moderator:

Hon. Eduardo V. Rodriguez, Chief U.S. Bankruptcy Judge

Panelists:

Andrew Jimenez, Office of the U.S. Trustee, Houston, TX

Brendon Singh, Tran Singh, Houston TX

2:15 p.m.

Break

Ice cream provided

2:30 p.m.

0.75 hours | .25 hour ethics

Motion Practice, Adversaries and Evidence

Pleading requirements, tips on drafting orders, what evidence should you present when your motion is contested, adversary deadlines, and more.

Moderator:

Hon. Alfredo R. Pérez, U.S. Bankruptcy Judge

Panelists:

Reese Baker, Baker & Associates, Houston, TX

Marcos Oliva, Oliva Law, McAllen, TX

Stephen Wilcox, Wilcox Law, Arlington, TX

3:15 p.m.

0.5 hours

Case Law Update

A review of recent cases and their implications to consumer bankruptcy practice

Panelists:

Hon. Alfredo R. Pérez, U.S. Bankruptcy Judge

Alban Beqiri, Law Clerk to Chief Judge Rodriguez

Zack Tripp, Weil, Gotshal & Manges LLP, Washington, D.C.

3:45 p.m.

1 hour | .5 hour ethics

Judges' Panel

Hear the SDTX Bankruptcy Judges answer questions regarding motions, confirmation, contested pleadings, continuances, and more.

Moderator:

Cristina Rodriguez, Office of Tiffany Castro, Houston, TX

Panelists:

Hon. Eduardo V. Rodriguez, Chief U.S. Bankruptcy Judge

Hon. Marvin Isgur, U.S. Bankruptcy Judge

Hon. Christopher M. Lopez, U.S. Bankruptcy Judge

Hon. Jeffrey P. Norman, U.S. Bankruptcy Judge

Hon. Alfredo R. Pérez, U.S. Bankruptcy Judge

4:45 p.m.

Chapter 7 Pro-bono Clinic

5:00 p.m.

End

2nd Annual Southern District of Texas Consumer Bankruptcy Conference January 16, 2025

PLANNING COMMITTEE MEMBERS

Co-Chairs

Chief Judge Eduardo V. Rodriguez
U.S. Bankruptcy Court, McAllen, Texas

Judge Marvin Isgur
U.S. Bankruptcy Court, Houston, Texas

Tiffany Castro
Chapter 13 Trustee, Houston, Texas

Judge Jeffrey P. Norman
U.S. Bankruptcy Court, Houston, Texas

Members

Alicia Barcomb
Office of the United States Trustee
Houston, Texas

Marcos Oliva
Oliva Law Firm
McAllen, Texas

Carl Barto
Law Office of Carl M. Barto
Laredo, Texas

David Peake
Chapter 13 Trustee
Houston, Texas

Kalvin Guyer
Law Clerk to Chief Judge Rodriguez,
Houston TX

Cristina Rodriguez
Office of Tiffany Castro, Chapter 13 Trustee
Houston, Texas

Kenneth Keeling
Keeling Law Firm
Houston, Texas

Brendon Singh
Tran Singh, LLP
Houston, Texas

Abe Limon
Limon Law Office
Brownsville, Texas

Yvonne Valdez
Chapter 13 Trustee
Corpus Christi, Texas

Sara Medellin
SDTX Clerk of Court Office
Houston, Texas

Steve Wilcox
Wilcox Law, PLLC
Arlington, Texas

Chris Murray
Jones Murray, LLP
Houston, Texas

The Small Business Debtor

Moderator

Hon. Marvin Isgur, U.S. Bankruptcy Judge

Panelists

Ravi Ratnala, The Ratnala Law Firm, PLLC

Alex Chalk, Bryeans & Garcia, PLLC

Michael Hardwick, Office of Tiffany Castro, Chapter 13 Trustee

Threshold Issues

- Who is the Debtor, the business or the owner?
 - Viability of the business as a going concern, personal guaranties, and end goals are all potential factors.
- Under which chapter to file?
 - *Chapter 7 – No discharge for business entities.*
 - 11 U.S.C. § 727(a)(1).
 - *Chapter 13 – New debt limits apply as of June 21, 2024.*
 - \$465,275 unsecured.
 - \$1,395,875 secured.
 - *Chapter 11, Sub V – Higher limit also sunset June 21, 2024.*
 - \$3,024,725 total debt.
 - Absence of the Absolute Priority Rule in Sub V is potentially a huge benefit over full Chapter 11.

Attorney Due Diligence

- Pull State Comptroller records to verify business name, structure, officers / stakeholders of record, and franchise tax status.
 - <https://mycpa.cpa.state.tx.us/coa/>
 - *Franchise tax forfeiture a common reason for loss of limited liability protection for business owners.*
- Pull Secretary of State records to search UCC filings.
 - <https://direct.sos.state.tx.us/lef/index.aspx>
 - *Many “secured” debts are not properly perfected.*

Business Valuation

- Opinion of the individual Debtor, or owner of the Debtor business, is usually sufficient for prima facie valuation.
 - *For most closely held businesses in Chapter 13, an asset-based methodology usually makes the most sense.*
 - *For larger or more complex businesses, or in some Sub V cases, an Income, Market, or DCF approach may be warranted.*
- Valuation experts are not typically used or needed in Chapter 13 cases.
 - *Expert opinions typically become an issue if a party in interest objects to valuation.*
 - *Involvement of experts more likely to be seen in Sub V cramdowns, e.g.*

Business Income Determination

- At a minimum, debtor needs to provide an Income (P&L) Statement for the past 6-12 months.
- Ideally, addition of a current Balance Sheet and Cash Flow Statement will provide a more complete picture and can all be reconciled to help verify valuation and income.

Secured Liability vs. Unsecured Personal Guarantee

- Who owes the debt? Who can pay the debt?
- LLC/Company liability vs. individual debtor's liability
- Personal Guarantee – secured or unsecured
- Can the LLC's secured liability be paid in an individual debtor's Plan?
- PMSI vs. lease or rent-to-own contract issues
- Proof of Claims vs. actual contract provisions

Review and Reconciliation of Financial Statements

- Balance Sheets.
- Income Statements.
- Sources and Uses of Cash.

Marvin's South Texas DIY Plumbing Supply

Balance Sheets for Years Ending December 31, 2023 and 2024

	2023	2024
ASSETS		
Cash and bank deposits	\$ 71,000	\$ 32,000
Accounts Receivable	\$ 100,000	\$ 120,000
Inventory	\$ 300,000	\$ 275,000
Other	\$ 15,000	\$ 15,000
Land and buildings	\$ 1,000,000	\$ 1,000,000
Less depreciation	\$ (200,000)	\$ (240,000)
Net book value of land buildings	\$ 800,000	\$ 760,000
 Total Assets	 \$ 1,286,000	 \$ 1,202,000
LIABILITIES AND EQUITIES		
Accounts payable	\$ 190,000	\$ 285,000
Bank line of credit	\$ 240,000	\$ 45,000
Mortgage on building	\$ 1,000,000	\$ 1,100,000
Capital invested	\$ 10,000	\$ 10,000
Retained Earnings	\$ (154,000)	\$ (238,000)
 TOTAL LIABILITIES AND EQUITIES	 \$ 1,286,000	 \$ 1,202,000

Marvin's South Texas DIY Plumbing Supply

Income Statement for Year Ended December 31, 2024

Revenue from sales	\$	344,000
Interest income	\$	12,000
Other income	\$	1,000
 Total income	 \$	 357,000
 Cost of goods sold	 \$	 163,000
Utilities	\$	19,000
Salaries	\$	120,000
Overhead and other administrative expenses	\$	23,000
Interest	\$	76,000
Depreciation	\$	40,000
 Total expenses	 \$	 441,000
 Net income (loss)	 \$	 (84,000)

Marvin's South Texas DIY Plumbing Supply

Sources and Uses of Funds for Year Ended December 31, 2024

Beginning cash and deposits on January 1	\$ 71,000
Net income for 2024	\$ (84,000)
Plus depreciation as non cash charge	\$ 40,000
Minus increase in accounts receivable	\$ (20,000)
Plus decrease in inventory	\$ 25,000
Plus increase in mortgage debt	\$ 100,000
Plus increase in accounts payable	\$ 95,000
Minus reduction in bank line of credit	\$ (195,000)
Expected ending cash balance	\$ 32,000
Actual ending cash balance	\$ 32,000

Common Business Issues in Consumer Cases

- Dealing with commingled personal & business income, expenditures, assets, and liabilities.
 - *Very common with unsophisticated business owners.*
 - *Key is to avoid “double dipping” accounts, assets, payments, etc. Classify each and remain consistent.*
 - Tax returns are sometimes useful in separating personal from business.
- Cash collateral issues
 - *When is a court order authorizing use necessary?*
 - 11 U.S.C. § 363(c)(2) – must have consent of secured creditor or a court order authorizing use.
 - This applies in individual cases as well as business cases.
 - BLR 4002-1(h) – “The Debtor must not use cash collateral without prior written consent of the secured creditor or an order.”

Common Business Issues (continued)

- Review financing documents / proofs of claim to determine if there is a perfected lien on cash collateral.
 - This is another place your UCC search will prove to be important.
- Tax liens attach to all assets; a secured tax claim means cash collateral issues in Chapter 11 and 13 cases.
 - 26 U.S.C. § 6321 – the lien attaches to “... all property and rights to property ...”
 - 26 U.S.C. § 6323 – the priority of the tax lien is first in time.
- 100% Debtor-owned LLCs
 - *LLC that is 100% owned by individual Debtor could be subject to administration by the Trustee.*
 - *Is there any way to exempt these assets?*
 - *Prepetition assignment of these assets to the individual Debtor should be done with caution if at all, and in accordance with the TBOC and the Operating Agreement.*
 - *Strong inference of fraudulent conveyance in these cases.*



**Save Time and Money with NDC.org
Debtor Attorney Tools**

Debtor Attorney Portal

Introducing: Reports

Some features of the Debtor Attorney Portal – highlighted popular reports:

- Attorney Payee

The screenshot displays the Debtor Attorney Portal interface. The top navigation bar includes links for Overview, Portfolio, Vouchers, Trustee Data Status, Reporting, and Settings. A search bar on the right shows 'Example: 1101234'. The main content area is divided into several sections:

- Welcome:** Displays the user's name (redacted) and 'LAW FIRM'. A link for 'My Profile' is present.
- You last logged in:** Shows the date and time '2/7/2022 11:14:23 AM CST' and the IP address '75.148.239.165'.
- NDC Notifications:** States 'No recent notifications' and provides a link to 'See All Notifications'.
- Quick Case Search:** A search bar with the placeholder '(Search by Case Number, SSN, or Last Name)' and a 'SEARCH' button. Below it is a link for 'Advanced Case Search'.
- Debtor Attorney Reports:** A list of reports with 'VIEW REPORT' buttons. The 'Attorney Payee Report' is highlighted with a red box.
- My Active Cases:** A table listing active cases with columns for Case, Debtor 1, Trustee Name, Last Payment, Last Disbursement, and Last Trustee Data U... (truncated). A 'View All Cases' link is at the top right of the table.

CASE	DEBTOR 1	TRUSTEE NAME	LAST PAYMENT ▲	LAST DISBURSEMENT	LAST TRUSTEE DATA U...
2131366	REYNOLDS JR, CHARLES ...	PEAKE, DAVID G. (HOUSTON, TX)	05/31/2022	05/31/2022	06/13/2022
1734149	WADE, CODY RYAN	PEAKE, DAVID G. (HOUSTON, TX)	06/07/2022	06/07/2022	06/13/2022
2280031	TRAVIS, JACQUELYN BETH	HEITKAMP, WILLIAM E. (HOUSTON, TX)	05/27/2022	05/31/2022	06/14/2022
1836582	ACKLEY, CHARLES ALLEN	PEAKE, DAVID G. (HOUSTON, TX)	06/03/2022	06/03/2022	06/13/2022
1930563	CROCKER, CAVAN WAYNE	PEAKE, DAVID G. (HOUSTON, TX)	06/10/2022	06/10/2022	06/13/2022
1734613	SULLINS JR., WARREN JACK	HEITKAMP, WILLIAM E. (HOUSTON, TX)	06/13/2022	06/13/2022	06/14/2022

Debtor Attorney Portal

Introducing: Reports

Attorney Payee Report

- Downloadable to the browser in multiple formats

AutoSave Off Attorney Payee Search (Alt+Q)

File Home Insert Draw Page Layout Formulas Data Review View Help Acrobat

A1 Attorney Payee Report

	A	B	C	D	E	F	G	H	I	J	K
1	Attorney Payee Report										
3	This report itemizes any claims where the payee is the Debtor Attorney and the amount remaining is greater than zero. Please verify these amounts with your Trustee office.										
5	Case #	Debtor LN	Trustee	Case Status	Claim Amt	Paid to Date	Amt Remaining	Last Disb Dt	Last Disb Amt	Filed Dt	Confirm Dt
6	1734567	Foose	Peake, G. David (HOUS2)	ABOUT TO CLOSE	\$100.00	\$100.00	\$0.00	04/02/18	\$11.08	07/28/17	11/28/17
7	1734567	Foose	Peake, G. David (HOUS2)	ABOUT TO CLOSE	\$300.00	\$300.00	\$0.00	10/01/19	\$300.00	07/28/17	11/28/17
8	1734567	Foose	Peake, G. David (HOUS2)	ABOUT TO CLOSE	\$610.50	\$610.50	\$0.00	06/01/20	\$610.50	07/28/17	11/28/17
9	1734567	Foose	Peake, G. David (HOUS2)	ABOUT TO CLOSE	\$3,393.00	\$3,393.00	\$0.00	04/02/18	\$375.87	07/28/17	11/28/17
10	2031540	RANDELL	Heitkamp, E. William (HOUS1)	ACTIVE	\$4,426.00	\$4,426.00	\$0.00	05/31/22	\$161.19	03/02/20	05/15/20
11	2031540	RANDELL	Heitkamp, E. William (HOUS1)	ACTIVE	\$125.00	\$0.00	\$125.00			03/02/20	05/15/20
12	2031540	RANDELL	Heitkamp, E. William (HOUS1)	ACTIVE	\$805.00	\$341.63	\$463.37	05/31/22	\$251.98	03/02/20	05/15/20
13	2031540	RANDELL	Heitkamp, E. William (HOUS1)	ACTIVE	\$425.00	\$0.00	\$425.00			03/02/20	05/15/20
14	1830976	Watts	Peake, G. David (HOUS2)	ACTIVE	\$275.00	\$275.00	\$0.00	10/01/21	\$275.00	03/05/18	05/31/18
15	1830976	Watts	Peake, G. David (HOUS2)	ACTIVE	\$3,876.00	\$3,876.00	\$0.00	03/02/20	\$873.54	03/05/18	05/31/18

Debtor Attorney Portal

Introducing: Reports

Some features of the Debtor Attorney Portal – highlighted popular reports:

- Attorney Payee
- Debtor Payment Report

The screenshot displays the Debtor Attorney Portal interface. At the top, navigation tabs include Overview, Portfolio, Vouchers, Trustee Data Status, Reporting, and Settings. A search bar on the right shows 'Example: 1101234'. Below the tabs, the 'Welcome' section shows a user profile for 'LAW FIRM' with a 'My Profile' link. It also indicates the last login time: '2/7/2022 11:14:23 AM CST from 75.148.239.165'. A section for 'NDC Notifications' states 'No recent notifications' with a link to 'See All Notifications'. On the right, there are two search boxes: 'Quick Case Search' and 'Debtor Attorney Reports'. The 'Debtor Attorney Reports' section lists four reports: 'Attorney Payee Report', 'Debtor Payment Report' (highlighted with a red box), 'Attorney Trustee Payment Report', and 'Debtor Trustee Documents Report', each with a 'VIEW REPORT' button. At the bottom, the 'My Active Cases' section features a table with columns for Case, Debtor 1, Trustee Name, Last Payment, Last Disbursement, and Last Trustee Data. A 'View All Cases' link is also present.

CASE	DEBTOR 1	TRUSTEE NAME	LAST PAYMENT ▲	LAST DISBURSEMENT	LAST TRUSTEE DATA U...
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1734613	SULLINS JR., WARREN JACK	HEITKAMP, WILLIAM E. (HOUSTON, TX)	06/13/2022	06/13/2022	06/14/2022

Debtor Attorney Portal

Introducing: Reports

Debtor Payment Report

1 of 2 ?

Debtor Payment Report

This report shows the last payment date, and calculates the days from the last payment in the rightmost column. This report does not take into consideration due dates or payment frequencies.

CASE							LAST PAYMENT AMT	LAST PAYMENT DATE	DAYS FROM LAST PAYMENT
Active-Open		BURK	Heitkamp, E. William (HOUS1)	ACTIVE	1,293.84	02/10/22			125
Active-Open		Schoonover	Peake, G. David (HOUS2)	ACTIVE	1,170.00	02/14/22			121
Active-Open		Coleman	Peake, G. David (HOUS2)	ACTIVE	1,225.00	03/02/22			105
Active-Open		WOODS	Heitkamp, E. William (HOUS1)	ACTIVE	927.60	03/09/22			98
							0.00	04/07/21	434
							2,627.44	01/04/22	162
							3,975.00	01/25/22	141
Active-Open		BURK	Heitkamp, E. William (HOUS1)	ACTIVE	1,293.84	02/10/22			125
Active-Open		Schoonover	Peake, G. David (HOUS2)	ACTIVE	1,170.00	02/14/22			121
Active-Open		Coleman	Peake, G. David (HOUS2)	ACTIVE	1,225.00	03/02/22			105
Active-Open		WOODS	Heitkamp, E. William (HOUS1)	ACTIVE	927.60	03/09/22			98
Active-Open		BROOKS	Heitkamp, E. William (HOUS1)	ACTIVE	2,643.46	03/15/22			92
Active-Open		SMALLWOOD	Heitkamp, E. William (HOUS1)	ACTIVE	219.23	03/16/22			91
Active-Open		HARDEN JR	Heitkamp, E. William (HOUS1)	ACTIVE	463.12	03/18/22			89

Debtor Attorney Portal Introducing: Reports

Some features of the Debtor Attorney Portal – highlighted popular reports:

- Attorney Payee
- Debtor Payment
- Attorney Trustee Payment

The screenshot displays the Debtor Attorney Portal interface. At the top, there is a navigation bar with tabs: Overview, Portfolio, Vouchers, Trustee Data Status, Reporting, and Settings. A search bar on the right shows 'Example: 1101234'. Below the navigation bar, the 'Overview' tab is active. The main content area includes a 'Welcome' message for a user from 'LAW FIRM', a 'My Profile' link, and login information: 'You last logged in 2/7/2022 11:14:23 AM CST from 75.148.239.165'. There are also 'NDC Notifications' and a link to 'See All Notifications'. On the right side, there is a 'Quick Case Search' section with a search bar and a 'SEARCH' button, and a 'Debtor Attorney Reports' section with four report links: 'Attorney Payee Report', 'Debtor Payment Report', 'Attorney Trustee Payment Report' (highlighted with a red box), and 'Debtor Trustee Documents Report'. Each report link has a 'VIEW REPORT' button. At the bottom, there is a 'My Active Cases' section with a 'View All Cases' link and a table of active cases.

CASE	DEBTOR 1	TRUSTEE NAME	LAST PAYMENT ▲	LAST DISBURSEMENT	LAST TRUSTEE DATA U...
2131366	REYNOLDS JR, CHARLES ...	PEAKE, DAVID G. (HOUSTON, TX)	05/31/2022	05/31/2022	06/13/2022
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1930563	CROCKER, CAVAN WAYNE	PEAKE, DAVID G. (HOUSTON, TX)	06/10/2022	06/10/2022	06/13/2022
1734613	SULLINS JR., WARREN JACK	HEITKAMP, WILLIAM E. (HOUSTON, TX)	06/13/2022	06/13/2022	06/14/2022

Debtor Attorney Portal

Introducing: Reports

Attorney Trustee Payment Report

- Get information on your Trustee payments
- Click on a check
- Links to our Voucher Service
- See the electronic details of the check or EFT
- Download the details to an Excel File

The screenshot displays the 'Enter Check/EFT Number' search interface. The search criteria are set to 'Peake, David G. (Houston, TX)' and '8003027'. A checkbox for 'Include checks older than 6 months' is checked. The search results are displayed under the heading 'VOUCHER DISPLAY RESULTS'.

Trustee Name	Peake, G. David	Check Number	8003027
Trustee City	Houston, TX	Check Date	06/01/2022
Payee Name	LAW FIRM	Check Amount	\$43,246.50
		Total Items	188 item(s)

Below the search results, an Excel spreadsheet is shown with the following data:

CaseNumber	Deb1LastName	Deb1FirstName	Deb1SSN	Deb2LastName	Deb2FirstName	Deb2SSN	CaseStatus	ClaimNumber	AccountNumber	ChkDate	CheckNo	CheckAmount	ClaimLev
1	52	Perez	0000	Perez	Rosa Gonzalez	0000	ACTIVE	37		6/1/2022	8003027	72.91	
3	31	O	0000			0000	DISMISSED AFTER CONFIRMATION (A)	37		6/1/2022	8003027	218.61	
4	20	Sa	0000		Jul	0000	DISMISSED AFTER CONFIRMATION (M)	43		6/1/2022	8003027	1.56	
5	09	Cl	0000			0000	ACTIVE	13		6/1/2022	8003027	23.67	
6	09	Cl	0000			0000	ACTIVE	14		6/1/2022	8003027	6.36	
7	09	Cl	0000			0000	ACTIVE	15		6/1/2022	8003027	17.75	
8	09	Cl	0000			0000	ACTIVE	16		6/1/2022	8003027	17.75	
9	09	Cl	0000			0000	ACTIVE	17		6/1/2022	8003027	16.27	
10	09	Cl	0000			0000	ACTIVE	18		6/1/2022	8003027	35.51	
11	09	Cl	0000			0000	ACTIVE	2		6/1/2022	8003027	196.35	
12	09	Cl	0000			0000	ACTIVE	20		6/1/2022	8003027	18.78	
13	09	Cl	0000			0000	ACTIVE	21		6/1/2022	8003027	21.83	
14	09	Cl	0000			0000	ACTIVE	22		6/1/2022	8003027	24.72	
15	09	Cl	0000			0000	ACTIVE	23		6/1/2022	8003027	65.13	
16	09	Cl	0000			0000	ACTIVE	25		6/1/2022	8003027	35.29	
17	10	Pe	0000			0000	DISMISSED AFTER CONFIRMATION (A)	28		6/1/2022	8003027	275	
18	10	Pe	0000			0000	DISMISSED AFTER CONFIRMATION (A)	29		6/1/2022	8003027	300	
19	1721158		00005588	Gonzalez	Corralle River	0000	COMPLETED (U)	20		6/1/2022	8003027	205.6	

At the bottom of the Excel spreadsheet, there are two buttons: 'DOWNLOAD' and 'DOWNLOAD TO EXCEL'. The 'DOWNLOAD TO EXCEL' button is highlighted with a red box.


Client Notifications

- Keep your clients engaged with their BK Case
- Avoid calls to your office



NDC.org: Other Cost Saving Benefits to you and your clients: Email Notifications

- The NDC Sends out several email notifications to Debtor/Clients
- Our three most popular:
 - **Monthly Summary**
(145,00/month)



HELLO, HERE IS YOUR MONTHLY NDC CASE SUMMARY:

YOUR BANKRUPTCY CASE HAS BEEN ACTIVE FOR 55 MONTHS.


HERE ARE THE MOST RECENT PAYMENTS RECEIVED INTO YOUR CASE:

\$722.00 ON 08/29/2022

\$722.00 ON 08/01/2022

\$722.00 ON 06/21/2022

YOUR NDC CASE ALERTS

 YOUR PAYMENT IN THE AMOUNT OF **\$722.00** WAS POSTED BY THE TRUSTEE ON AUG 29, 2022.
AUGUST 31

CLAIMS INFORMATION

AUTO

1ST FRANKLIN FINANCIAL CORPORATION - SECURED VEHICLE

\$5,924.38 OF \$5,924.38

PAYMENT COMPLETE

MID-ATLANTIC FINANCE CO - SECURED VEHICLE

\$121.71 OF \$2,303.18

SOUTHEAST INVESTMENT VENTURES - SECURED VEHICLE

\$3,570.18 OF \$3,570.18

PAYMENT COMPLETE

SOUTHEAST INVESTMENT VENTURES - SECURED VEHICLE

\$7,707.11 OF \$7,707.11

PAYMENT COMPLETE

SECURED/PRIORITY

FARMERS FURNITURE - HINESVILLE - SECURED

\$3,096.92 OF \$3,096.92

PAYMENT COMPLETE

ATTORNEY

JOHN E PYTTE - ATTORNEY FEE

\$4,500.00 OF \$4,500.00

PAYMENT COMPLETE

UNSECURED

AT&T MOBILITY II LLC - UNSECURED

\$1,266.89 PAID TO DATE

JEFFERSON CAPITAL SYSTEMS LLC - UNSECURED

\$406.25 PAID TO DATE

MIDLAND FUNDING LLC - UNSECURED

\$934.54 PAID TO DATE

MIDLAND FUNDING LLC - UNSECURED

\$0.00 PAID TO DATE

PORTFOLIO RECOVERY ASSOCIATES - UNSECURED

\$283.31 PAID TO DATE

QUANTUM3 GROUP LLC AS AGENT FOR - UNSECURED

\$417.77 PAID TO DATE

SPRINT CORP - UNSECURED

\$447.70 PAID TO DATE

US DEPARTMENT OF EDUCATION - UNSECURED

\$0.00 PAID TO DATE

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- The NDC Sends out several email notifications to Debtor/Clients
- Our three most popular:
 - Monthly Summary (145,00/month)
 - **Payment Received**
 - **Notification of Annual Reports** or other documents

Coming Soon: Debtor SMS/Text notifications

Office Mailing Address:
Albert Russo, Trustee
CN 4853
Trenton, NJ 08650

Send Payments **ONLY** to:
Albert Russo, Trustee
PO Box 933
Memphis, TN 38101-0933

OFFICE OF THE STANDING CHAPTER 13 TRUSTEE
REPORT OF RECEIPTS AND DISBURSEMENTS
Activity for the period from 07/11/2016 to 10/26/2017
Chapter 13 Case No. [REDACTED] / MBK

Petition Filed Date: 07/11/2016
341 Hearing Date: 08/18/2016
Confirmation Date: 11/22/2016

Case Status: Open / Confirmed

RECEIPTS / PAYMENT HISTORY FOR THE TIME PERIOD SELECTED

Date	Amount	Check No.	Date	Amount	Check No.	Date	Amount	Check No.			
09/15/2016	\$450.00	33206200	-	11/22/2016	\$900.00	34958860	-	11/28/2016	(\$900.00)	34958860	-
12/08/2016	\$400.00	17483788508	12/08/2016	\$500.00	17483788507	01/13/2017	\$450.00	24162887711			
01/13/2017	\$450.00	24162887700	03/15/2017	\$1,250.00	-						

Total Receipts for the Period: \$3,500.00 Amount Refunded to Debtor Since Filing: \$0.00 Total Receipts Since Filing: \$3,500.00

DISTRIBUTIONS TO CREDITORS FOR THE TIME PERIOD SELECTED

Claim #	Claimant Name	Class	Claim Amount	Amount Paid	Balance Due
0	[REDACTED]	Debtor Refund	\$0.00	\$0.00	\$0.00
1	AMERICAN INFOSOURCE LP AS AGENT FOR » SPOT LOAN/WD 9/15/2017	Unsecured Creditors	\$0.00	\$0.00	\$0.00
0	MARC C CAPONE, ESQ	Attorney Fees	\$1,750.00	\$1,510.53	\$239.47
0	MARC C CAPONE, ESQ » ORDER 9/2/16	Attorney Fees	\$900.00	\$776.84	\$123.16
2	WELLS FARGO BANK, NA	Unsecured Creditors	\$1,519.81	\$0.00	\$1,519.81
3	WELLS FARGO BANK, NA	Unsecured Creditors	\$198.68	\$0.00	\$198.68
4	PORTFOLIO RECOVERY ASSOCIATES » SYNCHRONY	Unsecured Creditors	\$1,152.26	\$0.00	\$1,152.26
5	U.S. BANK NATIONAL ASSOCIATION » P/241 MIDLAND BLVD/1ST MRTG/SV 9/26/17	Mortgage Arrears	\$129,027.88	\$0.00	\$129,027.88
6	U.S. BANK NATIONAL ASSOCIATION	Mortgage Arrears	\$7,154.65	\$0.00	\$7,154.65

Debtor Attorney Software: Integration



We have offered our API support to these Attorney Case filing and management systems

- You can pull augmented data from NDC within the application
- Can pull payment information for your clients
- Can pull payment information from Trustee to Attorney
- Special shout out to **Sybl Espinoza** from Tom Powers' office for her work on the BSS - Jubilee Integration



Thanks!



Thank you to all Participating Trustee offices



KEY ETHICAL ISSUES REGARDING ATTORNEY ADMISSIONS

Interested in avoiding the unauthorized practice of law? Step one is to ensure you are properly admitted before the Court you intend to practice.

There are two ways an **attorney** may gain **admission to practice** in the courts of the Southern District of Texas: (1) file a written application and obtain approval with the clerk of court issuing a Certificate of Admission. This approval allows an **attorney** to practice at all times in the Southern District of Texas; or (2) obtain permission from the judge before whom the case or adversary proceeding is pending. This approval allows an **attorney** to serve as **attorney-in-charge**, or as an **attorney** assisting the **attorney-in-charge**, in a specific case or adversary proceeding until its completion.

This short primer will identify the key rules every attorney should be aware of who intends to practice before the Southern District of Texas and will examine an opinion to better understand the ethical pitfalls of this area.

What are the Rules regarding Admission to Practice?

- A. Bankruptcy Local Rule 1001(b) incorporates the Local Rules of the District Court, including District Local Rule 83.1.

1. LR83.1. Admission to Practice.

- a. Eligibility. A lawyer applying for admission to the bar of this court must be licensed to practice law by the licensing authority of one of the fifty states, the District of Columbia, or a Territory of the United States. If licensed by a licensing authority other than the State of Texas, then an attorney must also be a member in good standing of a United States District Court. Attorneys employed by the Department of Justice or the Federal Public Defender are exempt from the requirement of good standing in another United States District Court.
- b. Each application for admission filed with the clerk shall be accompanied by:
 - i. Payment of \$199.00. Attorneys employed by an agency of the United States, the Federal Public Defender or the Texas Attorney General are exempt from paying the fee.
 - ii. An executed Oath (not more than 30 days old).
 - iii. An attorney who is not licensed by the State of Texas must submit a Certificate of Good Standing (not more than 90 days old) from another Federal Court.
- c. Expiration. Members of the bar **must renew their membership every five years** from the date of admission by filing a renewal application and paying the fee. If a member fails to renew before the expiration of the term, the attorney may file a request for renewal after expiration. If an attorney's membership has been expired for 10 years, the attorney will need to submit a new application to be readmitted to the Southern District of Texas.

- d. Practice Without Admission. A lawyer who is not admitted to practice before this Court may appear for a party in a case in this Court with the permission of the judge before whom the case is pending by filing a Motion to Appear Pro Hac Vice on the prescribed form. A Motion to Appear Pro Hac Vice filing fee may be set by the Court.
- 2. Bankruptcy Local Rule 9003-1. Matters Heard Ex Parte.**
- a. Motions for admission pro hac vice may be considered *ex parte*.
 - b. Motion for Admission Pro Hac Vice form, separate form for adversary proceedings and main bankruptcy case.
 - c. \$100 fee for admission pro hac vice is required as of August 1, 2023.
 - d. A lawyer seeking to appear pro hac vice should first register for e-filing in the Southern District of Texas. Once the e-filing request has been processed, then the attorney can electronically file the motion and pay the fee.
- 3. *In re Zuniga*, 332 B.R. 760 (Bankr. S.D. Tex. 2005).**
- a. Chapter 7 debtor’s lawyers were both not admitted to the SDTX. One attorney licensed in California, the other held a probationary law license from the State of Texas, neither applied for admission nor filed an application to practice *pro hac vice*.
 - b. “Any lawyer appearing before the District Court, and hence the Bankruptcy Court, ‘confers disciplinary jurisdiction upon the court under these rules.’ DLR, Appendix A, Rule 7 (Oct. 10, 1996). Violations of the disciplinary rules serve as grounds for disciplinary action.”
 - c. Moreover, by filing the bankruptcy petition, both attorneys “made an appearance before this Court. Therefore, the Texas Disciplinary Rules govern both [attorneys]. Additionally, Texas Disciplinary Rule 8.04 specifically states ‘a lawyer shall not: (1) violate these rules, . . . or do so through the acts of another, . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . . or (12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.’
 - d. “... even if [attorney] did not prepare the documents, signing his name as the Debtor's **attorney** and filing documents with the Bankruptcy Court, without properly verifying the information contained in those documents, constitutes the practice of law. Attorney was practicing law in the Southern District of Texas without leave of the District Court or this Court and therefore violated DLR 83.1 Thus, he engaged in the unauthorized practice of law.”
 - e. Admission “is an affirmative requirement. Even if other courts have allowed [attorney] to practice without being admitted and without obtaining *pro hac vice* status, [attorney] did not obtain such an exception from this Court. [attorney] failed to disclose his non-admitted status, and this omission constituted an affirmative misrepresentation.”

KEY ETHICAL ISSUES REGARDING WITHDRAWAL & SUBSTITUTION OF COUNSEL

Understanding how to properly withdraw from representation is critical to avoid disciplinary issues that may arise from withdrawal or the substitution of counsel. While the procedure is fairly straightforward, a strong grasp of the when, why, and how protects former counsel, new counsel, and the former client.

On occasion, situations may arise where there is a breakdown in the communication, trust, or circumstances between a client and their attorney. These situations can be cured through withdrawal or substitution.

When: A substitution of counsel can occur any time after a case is filed up until the case is dismissed or discharged/closed.

1. Texas Disciplinary Rules of Professional Conduct (October 1, 2024, Version)

a. Rule 1.01 Competent and Diligent Representation

- i. (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
 - 1. another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
 - 2. the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

ii. Comment 5

- 1. A lawyer offered employment or employed in a matter beyond the lawyer's competence generally must decline or withdraw from the employment or, with the **prior informed consent** of the client, associate a lawyer who is competent in the matter.

Why: Withdrawal is sometimes mandatory, and sometimes optional, but when an attorney makes this determination, they must remember that they still possess obligations to their former client.

1. Texas Disciplinary Rules of Professional Conduct (October 1, 2024, Version)

a. Rule 1.06 Conflict of Interest Comment 1

- i. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.17

b. Rule 1.16 Declining or Terminating Representation

- i. (Mandatory Withdrawal) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, ... from the representation of a client, if
 - 1. the representation will result in violation of Rule 3.08 (lawyer as a witness), other applicable rules of professional conduct or other law;
 - 2. the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client; or
 - 3. the lawyer is discharged, with or without good cause.
- ii. (Optional Withdrawal) Except as required by paragraph (i), a lawyer shall not withdraw from representing a client unless:
 - 1. withdrawal can be accomplished without material adverse effect on the interests of the client;
 - 2. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;
 - 3. the client has used the lawyer's services to perpetrate a crime or fraud;
 - 4. a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
 - 5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - 6. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - 7. other good cause for withdrawal exists.

c. Rule 1.16(d)

- i. (d) Upon termination of representation, **a lawyer shall take steps to the extent reasonably practicable to protect a client's interests**, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

d. Rule 1.16 Comment 9

- i. In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

How: Generally, new counsel files a motion or stipulation for substitution of counsel for Court approval.

1. Bankruptcy Local Rule 2014-1(a)

- a. An application for employment by an attorney for the debtor or a motion for substitution of counsel for the debtor must have attached the statement required by FED. R. BANKR. P. 2016(b) and § 329(a) of the Bankruptcy Code.
- b. **FED. R. BANKR. P. 2016(b)** - The statement must:
 - i. **(A)** show whether the attorney has shared or agreed to share compensation with any other entity; and
 - ii. **(B)** if so, the particulars of any sharing or agreement to share, except with a member or regular associate of the attorney's law firm.
- c. **11 U.S.C. § 329(a)** - Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
 - i. The disclosure requirements of § 329(a) are mandatory, not permissive, and apply "whether or not the attorney ever applies for compensation." *In re Wright*, 578 B.R. 570 (Bankr. S.D. Tex. 2017).

2. District Local Rule 83.2 Withdrawal of Counsel

- a. "Although no delay will be countenanced because of a change in counsel, withdrawal of counsel-in-charge may be effected by motion and order, under conditions imposed by the Court."

Notes from Caselaw:

- An attorney may withdraw from representation only upon leave of the court and a showing of good cause and reasonable notice to the client. *In re Wynn*, 889 F.2d 644, 646 (5th Cir. 1989). The withdrawal of an attorney in a given case is a "matter entrusted to the sound discretion of the court and will be overturned on appeal only for an abuse of that discretion." See *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976) (en banc), cert. denied, 429 U.S. 1104, 97 S. Ct. 1133, 51 L. Ed. 2d 556 (1977); *Broughten v. Voss*, 634 F.2d 880 (5th Cir. 1981).

- Counsel for a consumer debtor has an obligation to render a threshold level of services and cannot generally carve-out certain basic tasks. *See Hale v. United States Trustee*, 509 F.3d 1139, 1149 (9th Cir. 2007) (noting that bankruptcy counsel may not exclude from representation of the debtor “critical and necessary services”); *In re Johnson*, 291 B.R. 462, 469 (Bankr. D. Minn. 2003) (attorneys representing individual debtors in chapter 7 cases may not “unbundle the core package of ordinary legal representation reasonably anticipated in every case”); *In re DeSantis*, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008) (counsel for an individual chapter 7 debtor in a consumer case may not exclude from the scope of representation certain essential services; debtor's counsel “must advise and assist their clients in complying with their responsibilities assigned by Section 521 of the Bankruptcy Code, including helping their clients decide whether to surrender collateral or instead to reaffirm or to redeem secured debts.”).
- *In re Cruz*, 2020 Bankr. LEXIS 2298, (Bankr. S.D. Tex. 2020). “When lawyers compromise ethics for expediency, the results are predictable.”
 - An attorney owes *each* client a duty of diligent and competent representation.
 - Public confidence in the judicial system demands the professional representation of each person and even a single failure to deliver adequate representation is cause enough to order relief.

Best Practices:

- Communicate clearly to the client that you are withdrawing. Tell them why.
- Recommend New Counsel.
- Do not risk breaching confidentiality by oversharing in a motion to withdraw or in the motion for substitution, use Rule 1.16 language.
- Be prepared to cooperate in transitioning the case/matter as required by Rule 1.16(d).

KEY ETHICAL ISSUES WHE REPRESENTING AN INCOMPETENT DEBTOR

The inability to manage one's finances does not make one incompetent. Otherwise by definition, all debtors would be incompetent. Forgetting the breadth of your chinaware is one thing but forgetting where you live or who your children or how many loans you have co-signed for your grandson is quite another. Identifying the difference between the two is critical when dealing with certain debtors both at the pre-petition stage and the post-petition stage. This short paper will identify some basic concepts about incompetency in the bankruptcy context and state guardianship context and the four rules every Debtor's attorney should be aware of when representing incapacitated debtors as well as identify some key bankruptcy legal opinions that are relevant when dealing with incapacitated/incompetent debtors.

I. When Is A Debtor Incompetent?

A. Bankruptcy Code definition of "incompetent"

1. The Bankruptcy Code does not define the term "incompetent." In re Moss, 239 B.R. at 539. Bankruptcy courts generally look to state law for guidance. In re Maes, 616 B.R. 784 (Bankr. Colo. 2020); In re Brown 645 B.R. 524 (S.C. 2022); see also In re Whitehead , No. 05-50136, 2005 WL 1819399, at *4 (Bankr. M.D.N.C. July 22, 2005) (citing Matchem v. Frank , 998 F.2d 1009, 1010 (4th Cir. 1993) ; Siers v. Greiner , 983 F.2d 1057, 1058 (4th Cir.1993) all in the context of Fed. Rule of Civ. Pro. 17(c).
2. Even though the Bankruptcy Code does not define the word "incompetent," it does define the analogous term "incapacity." 11 USC 109(h)(4) defines "incapacity" as follows:

11 U.S.C. 109(h)(4) says:

The requirements of paragraph (1) [*dealing with the requirement for a credit counseling certificate*] shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

Some courts have used the definition of "incapacity" under 109(h)(4) and found similarities in state law to determine that a Debtor who has such an "incapacity" is "incompetent" and in need of help for the prosecution of their bankruptcy case under Bankruptcy Rule 1004.1. In re Maes, 616 B.R. 784 (Bankr. Colo. 2020).

B. Texas Estates Code definition of "incompetent"

1. The Texas definition of “incompetent” is much broader and highly contextual. Generally, however, the term “incompetent” is also usually defined to be the equivalent of “incapacitated.” See generally Title 3 to the Texas Estates Code (TEC)(the Guardianship Provisions) and specifically Texas Estates Code (TEC) 1001.003 which states:

Sec. 1001.003. REFERENCES IN LAW MEANING INCAPACITATED PERSON. In this code or any other law, a reference to any of the following means an incapacitated person:

- (1) a person who is mentally, physically, or legally incompetent;
- (2) a person who is judicially declared incompetent;
- (3) an incompetent or an incompetent person;
- (4) a person of unsound mind; or
- (5) a habitual drunkard.

2. Texas courts generally analyze the need for a guardianship over an incapacitated person based on a Physician’s Certificate of Medical Examination among other things. It is quite comprehensive. A sample letter is attached at the end of these materials. The areas of functional incapacity that a Physician’s Letter typically addresses to help a court determine “incapacity” are as follows:

Can the proposed ward make:

- A. Complex business, managerial, and financial decisions which are context specific.
- B. Manage a bank account
- C. Safely operate a motor vehicle
- D. Vote in a public election
- E. Make decisions regarding marriage
- F. Determine their own residence
- G. Administer their own medications
- H. Administer their own ADLS (Activities of Daily Living) such as bathing, dressing, self-feeding, transferring mobility, personal hygiene and grooming and toilet hygiene.
- I. Consent to medical and dental treatment
- J. Consent to psychological and psychiatric treatment.

As the above non-exhaustive list indicates, the ability to manage one’s finances is only one of many other functionalities that a state or probate court would look at in determining if a person is incapacitated and in need of a guardian or some other legal representative. Courts tend to set a high bar to determine incapacity because a guardianship can curtail the right to vote, the right drive a car, the right to marry, the right to not be confined in a facility, among other important rights of every individual. From the financial perspective, appointing an ad litem significantly curtails the extent of control by the Debtor over his assets, especially his monthly income. Generally, most guardianship orders entered by state courts will direct that the guardian

becomes the sole signatory on the accounts, the exclusive person to receive the debtor's income from any source, to communicate with the payors of such funds, to prohibit any changes in the manner or method of payment of such funds or place of payments without proper notice to and authority of the court. Additionally, the Texas Estates Code requires that a guardian appointed under state law must file annual accounts with detailed evidence documenting income and expenses and any changes in the value of the estate. See Texas Estates Code 1163.051.

C. Some common badges of potential incapacity for the elderly¹

1. Shared title to bank – “homemade estate planning.”
2. Shared title to home – often with children.
3. Transfer of home, sometimes without knowledge of the recipient.
4. Life estate that the client did not understand what rights remained.
5. Credit cards - continued high spending after retirement.
6. Co-signed vehicle loans for adult children/grandchildren when client is on fixed income.
7. Co-signed student loans and co-signed apartment leases when client on fixed income, often vulnerable to requests by family with poor credit.
8. Family members living at home but not contributing financially.
9. CDs or other financial instruments pledged as collateral for family loans.

Other badges of potential incapacity include:

10. Inability to know the extent of debt or assets (inability beyond the normal)
11. Inability to relate to close relatives
12. Frequent illnesses
13. High amount of medical debt/medications for depression; anxiety; dementia, Alzheimers Disease.
14. Veteran with PTSD
15. Presence of a dominating provider or caretaker, especially if live-in.
16. Others are living in the household without significant contribution.
17. High utility expenses when elderly “lives alone.”
18. Regular support of relatives when on a fixed income or making large gifts to them.

D. Other helpful references to identify an incompetent debtor²

The Alzheimer's Association has provided 10 early signs of dementia that may merit a visit to a doctor for further testing. Within the bankruptcy context, these signs may pop up at times when taking a client from the initial consultation to the actual filing and eventually to discharge.

¹ From “Representing Elderly Clients in Bankruptcy, Parts 1, 2, and 3” by David Cox. Cox Law Group PLLC. Papers published by NACTT Academy, January 5, 2020.

² See https://www.alz.org/alzheimers-dementia/10_signs.

1. Memory loss that disrupts daily life; (forgetting names; appointments to your office and follow ups; failure to find basic documents needed for the case like tax returns, bank statements, proof of insurance.)
2. Challenges in planning or solving problems; (inability to assist you in determining which chapter needs to be filed.)
3. Difficulty completing familiar tasks at home, at work, or at leisure;
4. Confusion with time or place (inability to find your office repeatedly);
5. Trouble understanding visual images and spatial relationships;
6. New problems with words in speaking or writing;
7. Misplacing things and losing the ability to retrace steps;
8. Decreased or poor judgment;
9. Withdrawal from work or social activities;
10. Changes in mood and personality.

II. The Applicable Ethical and Bankruptcy Rules:

When representing a Debtor who is incompetent or mentally incapacitated four major rules (non-bankruptcy and bankruptcy) should be consulted regularly as well as any applicable Bankruptcy Local Rules.³ The biggest takeaway from the rules of professional conduct is of course: “take care of your client.” As with most rules of professional conduct, the helpful language is found in the comments section to the rules.

A. RULE #1:

Texas Disciplinary Rules of Professional Conduct 1.17 (effective October 1, 2024)

Rule 1.17. Clients with Diminished Capacity

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of

³ The only Bankruptcy District in Texas with a local rule that addresses incompetent Debtors is the Western District. See Bankruptcy Western District Local Rule 1004.1 which requires the filing of the appointment instrument along with the petition if the petition is being filed on behalf of a “representative, such as a guardian or conservator appointed by a court.” If the petition is filed by a holder of a power of attorney, a proposed guardian ad litem, or proposed next friend, a motion must be filed with the petition seeking the appointment of the Filing Party to be the debtor’s representative, under Bankruptcy Rule 1004.1.

a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

Comments to Rule 1.17:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.⁴

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons, including a previously designated trusted person, participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. As part of the client intake process, lawyers

⁴ In Texas, family courts can have an in camera session with a minor above the age of 12 to allow the child to express his opinion as to preferences regarding custodial issues.

may wish to give new clients the opportunity to designate trusted persons who may be contacted by a lawyer if special needs arise.⁵ Any such procedure should provide sufficient information for the client to understand and confer with the lawyer about the designation of a trusted person. Standardized forms may be available from bar associations and practice groups. Information about trusted person designations should be appropriately safeguarded and periodically updated, as necessary. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

Taking Protective Action:

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect an existing client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections. If it appears to be necessary to disclose confidential information to a third person to protect the client's best interests, a lawyer should consider whether it would be prudent to ask for the client's consent to the disclosure. Only in compelling cases should the lawyer disclose confidential client information if the client has expressly refused to consent. The authority of a lawyer to disclose confidential client information to protect the interests of the client is limited and extends no further than is reasonably necessary to facilitate protective action.

Duties Under Other Law

6. Nothing in this Rule modifies or reduces a lawyer's obligations under other law.

7. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

⁵ Texas was one of the first states in the nation in 2015 to pass legislation allowing for laws recognizing supported decision-making agreements as an alternative to guardianship. It allows individuals to make their own decisions and stay in charge of their lives, while receiving the help and assistance from a trusted person. It can help them understand the options, responsibilities, and consequences of their decisions, obtain and understand information relevant to their decisions, and communicate their decisions to the appropriate people. Under a supported decision-making agreement, the **supporter CANNOT** make a decision for a person with a disability. A sample form is attached to these materials. It conforms to the sample found in Texas Estates Code Section 1357.

8. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Estates Code prescribes when a guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

Disclosure of the Client's Condition

9. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client. A disclosure of confidential information may be inadvisable if the third person's involvement in the matter is likely to turn confrontational.

Emergency Legal Assistance

10. In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

11. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

B. RULE #2:

ABA Model Rule 1.14: Client with Diminished Capacity (effective 1983)

Client-Lawyer Relationship

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comments to Rule 1.14 Client With Diminished Capacity

Client-Lawyer Relationship

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized

that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

2. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

3. The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

4. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

5. If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

6. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values

of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

7. If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

8. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

9. In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

10. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

C. Rule #3

Bankruptcy Rule 1004.1 (applies to incapacity before filing)

Rule 1004.1. Petition for an Infant or Incompetent Person

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

D. Rule #4

Bankruptcy Rule 1016 (applies to incapacity after filing)

Rule 1016. Death or Incompetency of Debtor

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

III. Other relevant Code provisions/rules regarding incapacity:

Bankruptcy Rule 7017 incorporating Fed. R. Civ. P. 17(c) regarding the use of a guardian or next friend in adversary proceedings:

(c) MINOR OR INCOMPETENT PERSON.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:

- (A) a general guardian;
- (B) a committee;
- (C) a conservator; or
- (D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

IV. Some important case law:

In re Sapp, Memorandum opinion in Case No. 10-20580-659 (Bankr. E.D. Mo. Jul. 20, 2011) This case holds that as a general rule incompetent persons are not barred from filing a voluntary bankruptcy petition via a representative under law citing a long list of cases so holding: See **In re Kjellsen**, 155 B.R. 1013, 1018 (Bankr. D.S.D. 1993), rev'd on other grounds (Congress did not intend to bar incompetent persons from filing a voluntary bankruptcy petition; to so do would likely raise constitutional issues of due process and equal protection); **In re Kirschner**, 46 B.R. 583, 584 (Bankr. E.D. N.Y. 1985), abrogated on other grounds by **In re Colish**, 289 B.R. 523 (Bankr. E.D. N.Y. 2002)(wife who was appointed guardian ad litem of her husband by the Supreme Court of the State of New York to file a petition in Bankruptcy was permitted to do the same); see also **In re Zawisza**, 73 B.R. 929, 932 (Bankr. E.D. Pa. 1987)(an incompetent debtor is not barred from seeking relief in bankruptcy via a court appointed guardian). **In re Smith**, 115 B.R. 84 (Bankr. E.D. Va. 1990)(an incapacitated or disabled person may file bankruptcy through a guardian or next friend, but not a mere power of attorney unless the power of attorney is expanded to include the power to file bankruptcy petition on debtor's behalf) but see the Texas Power of Attorney statute that authorizes the filing of a bankruptcy under a durable power of attorney even if the form does not specifically grants that specific power; **In re Myers**, 350 B.R. 760, 76263 (Bankr. N.D. Ohio 2006)(an incompetent person may be a debtor in a Chapter 7 case, and the Court may appoint a next friend to act on the debtor's behalf pursuant to Bankruptcy Rule 1004.1 and Section 105); **In re Clinton**, 41 F.2d 749 (S.D. Cal. 1930)(a person adjudged incompetent may on petition of guardian, as authorized by probate court, be a debtor in bankruptcy); cf. **In re Raymond**, 12 B.R. 906 (Bankr. E.D. Va. 1981)(where wife who only held power of attorney over her Sailor husband, who was serving in the U.S. Navy, could not file a joint petition on her and her husband's behalf.”

In re U.S. vs. Spurlin, 664 F.3d 954, 959 (5th Cir.2011). The case holds that a general power of attorney can be used to file bankruptcy on behalf of another if the Debtor ratifies by some means the intent to file bankruptcy. This case involved a Debtor husband who filed a joint case for the wife using a POA signed by the wife. Bankruptcy criminal acts were alleged (concealment of

assets). The husband died within 6 days from the filing but she showed up at the 341 meeting and did not appear angry nor did she complain of the filing. When charged with numerous bankruptcy crimes, she alleged the POA was insufficient authority to allow her filing and argued she was not to blame for the concealment of assets. The Court allowed the use of the POA and affirmed the conviction.

In re Matthews, 516 B.R. 99 (Bankr. N.D. Tex. 2014) (Judge Jernigan). The key issue in this case involved the use of a Power of Attorney signed pre-petition by an incapacitated elderly debtor who was in a nursing home to excuse her from appearing at the 341 meeting and have the daughter/agent appear instead. Judge Jernigan relied on the Spurlin 5th Circuit case but looked also at state law as to whether a POA can bind the principal in a bankruptcy. The Court expressed concerns about abuse since mother was in a nursing home but had incurred more than 82K in unsecured debts. The Court agreed that the Texas Estates Code allows the use of a POA to bind the principal but felt that in a bankruptcy context this was not enough to impose safeguards. The court felt appointing a guardian ad litem under BR 1004.1 had more safeguards than a POA and ordered the daughter to re- file the motion with an affidavit showing mother was competent when she signed the POA and that she consented to the bankruptcy and under what circumstances she signed the POA. The Court also ordered that Debtor's counsel confirm to the Court that the Debtor was informed and consented to the filing.

In re Brown, 645 B.R. 524 (S.C. 2022). In a period of 3 years, Debtor filed four different bankruptcy cases. In the fourth case, the Debtor filed a motion under BR 1004.1 to appoint a "next friend." There was no POA, only a medical POA. The "next friend" signed the initial petition and schedules. The "next friend" was the Debtor's son who lived with Debtor during his entire life. The Debtor had difficulty communicating due to a stroke. The son was familiar with dad's finances but had not helped him in the prior cases. The Court looked to state law to determine if the Debtor was incompetent under BR 1004.1. Under South Carolina law, "[m]ental incompetence is established by credible evidence that the subject, because of mental impairment, has become incapable of managing his own affairs." The Court found the Debtor incompetent but then looked at the issue of whether the son, acting as next friend, could continue helping the Debtor prosecute the case. Relying in part on the concern to safeguard the Debtor as mentioned in Matthews, the Court found that a "next friend" is not sufficient to fully safeguard the interests of the Debtor because a "next friend" is not a fiduciary with specific duties and obligations under law. Additionally, the Court found that the term "next friend" is not mentioned in BR 1004.1 allowing for the continued representation of the Debtor but only for the initial filing of the petition. The court went on to appoint a guardian ad litem.

In re Maes, 616 B.R. 784 (Bankr. Colo. 2020). Daughter filed a petition for her elderly mother who suffered from dementia and who had forgotten to make some house payments and was facing a foreclosure. Daughter had mother sign a POA prior to the filing. The Trustee challenges the POA claiming Debtor was incompetent and could not legally sign the POA. The Court affirms that the POA is defective. The Court nevertheless ruled that the initial filing was effective because the Debtor was essentially acting as the Debtor's "next friend." The Debtor moved to have the

agent daughter be appointed guardian ad litem under BR 1004.1. The Court takes a deep dive into the Debtor's medical condition and family support system and determines that the Debtor is in need of an ad litem. The Court looked to state law which defines the term "incapacity" as "an individual who is unable to effectively receive or evaluate information or both to make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care." The court further analogized this term under Colorado law to the term "incapacity" under 11 U.S.C. 109(h)(4) and found them to be enough authority to appoint the ad litem to protect the Debtor's "financial interests and responsibilities." Interestingly, the Court also said that it disagreed with any court decision that appoints a "next friend" under BR 1004.1 as the rule does not plainly authorize it. Further, the Court states that as an ad litem for the Debtor, the ad litem may on behalf of the Debtor: "retain and instruct legal counsel for the Debtor; file and prosecute any Chapter 13 plan or modification thereto; file, prosecute, or defend any pleading, motion, objection, or response; seek conversion or dismissal of the Debtor's bankruptcy case; make payments under any Chapter 13 plan; file a verification of confirmable plan; request the entry of discharge; and take any other action on behalf of the Debtor in this bankruptcy case."

The Court also added the following (which should raise red flags for every practitioner):

"In the performance of her role as guardian ad litem, Juanita Maes shall be obligated to act as a fiduciary for the Debtor. Such fiduciary duties shall include, but are not limited to: the duty to act in accordance with the Debtor's reasonable expectations (to the extent actually known); the duty to act in the Debtor's best interests; the duty to act in good faith; the duty to act loyally for the Debtor's benefit; the duty to act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances. Juanita Maes shall not be entitled to compensation for her role as guardian ad litem for the Debtor, unless otherwise permitted by Court Order. The Court's incompetency determination is made only with respect to the Debtor's financial affairs and for purposes of this bankruptcy case. This determination shall have no impact in other areas such as medical treatment decision-making or otherwise."

Debtor practitioners should keep this case handy when dealing with an ad litem situation as Debtor's counsel very likely has expanded ethical duties in this regard. Debtor's counsel should monitor the conduct of the ad litem in his or her duties towards the Debtor.

Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). The Supreme Court in the context of a habeas-corpus case, formulated a test to determine whether a person may qualify as next friend. Some bankruptcy courts have adopted that test under Rule 1004.1. *See; Brown*, 645 B.R. at 529; *Maes*, 616 B.R. at 800. First, the party must "provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf." Second, the proposed next friend must "be truly dedicated to the best interests of the person" and have a "significant relationship with the real party in interest."

In re Moss, 239 B.R. at 537 (Bankr. W.D. Mo. 1999). This case involved the use of state law in Missouri before adoption of BR 1004.1 and BR 1016 finding "the appointment of a limited guardian" to be "necessary and appropriate . . . because it will aid in the administration of the case . . .". The case involved a chapter 7 debtor that filed pro se and filed declarations that she was extremely ill and could not attend her 341 meeting. Thereafter she filed a declaration that she had died. Both pleadings were found to be false. She was indicted for bankruptcy fraud but was declared to be unfit to assist in her criminal defense. Further, the Court appointed a guardian ad litem for the Debtor to assist in the continuation of the bankruptcy case. The Court stated that the appointment was necessary "in order to adequately protect the rights of the Debtor, facilitate the expeditious administration of the bankruptcy estate, and preserve the integrity of the bankruptcy court and bankruptcy process"

Other helpful references:

Keith M. Lundin, Lundin on Chapter 13, Section 10.9 "Petitions on Behalf of Others: Incompetents, Next Friends, Powers of Attorney, and the Like."

See also How To Not Lose Your Mind When Your Client Is Losing His: Operating In The Gray Zone Of Diminished Capacity, Houston Business & Estate Planning Council Seminar, February 2020 by Kristi N. Elsom and Matt G. Leuders.

Solutions For Incompetent Debtors In Bankruptcy: Financial Guardians, Guardians Ad Litem, And Other Financial Supervision by Reese W. Baker, Dana Drexler, and Dinorah Gonzalez, 31st Annual Advanced Consumer Bankruptcy Course, Dallas, Texas, Feb. 4-5, 2016. This articles has excellent sample motions to appoint a guardian ad litem for an incapacitated debtor and sample orders issued by Judge Marvin Isgur outlining the scope of the appointments.

Health Care Provider's Certificate of Medical Examination

Revision September 2023

In the Matter of the Guardianship of _____,

For Court Use Only

an Alleged Incapacitated Person

Court Assigned: _____

To the Physician, Psychologist, or Advanced Practice Registered Nurse

This form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (on page 3), and whether that person should have a guardian appointed.

1. General Information

Examining Health Care Provider's Name _____ Phone: (____) _____

Office Address _____

Select one: ☐ I am a physician currently licensed to practice in the State of Texas;
☐ I am a psychologist currently licensed in the State of Texas or certified by HHSC; or
☐ I am an advanced practice registered nurse acting under a physician's delegation authority and supervision in accordance with Chapter 157, Occupations Code.

☐ YES ☐ NO I have experience examining individuals with the physical or mental condition resulting in the Proposed Ward's incapacity; or

☐ YES ☐ NO I have an established patient-provider relationship with the Proposed Ward

Proposed Ward's Name _____

Date of Birth _____ Age _____ Gender ☐ M ☐ F

Proposed Ward's Current Residence: _____

I last examined the Proposed Ward on _____, 20____ at:

☐ a Medical facility ☐ the Proposed Ward's residence ☐ Other: _____

☐ YES ☐ NO The Proposed Ward is under my continuing treatment.

☐ YES ☐ NO Before the examination, I informed the Proposed Ward that communications with me would not be privileged.

☐ YES ☐ NO A mini-mental status exam was given. If "YES," please attach a copy.

2. Evaluation of the Proposed Ward's Physical Condition (required to be completed by physician or APRN only, not psychologist)

Physical Diagnosis: _____

a. Severity: ☐ Mild ☐ Moderate ☐ Severe

b. Prognosis: _____

c. Treatment/Medical History: _____

3. Evaluation of the Proposed Ward's Mental Functioning

Mental Diagnosis: _____

a. Severity: ☐ Mild ☐ Moderate ☐ Severe

b. Prognosis: _____

c. Treatment/Medical History: _____

If the mental diagnosis includes dementia, answer the following:

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be placed in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be administered medications appropriate for the care and treatment of dementia.

☐ YES ☐ NO ---- The Proposed Ward currently has sufficient capacity to give informed consent to the administration of dementia medications.

d. Possibility for Improvement:

- ☐ YES ☐ NO ---- Is improvement in the Proposed Ward's physical condition and mental functioning possible?
If "YES," after what period should the Proposed Ward be reevaluated to determine whether a guardianship continues to be necessary? _____

4. Cognitive Deficits

- a. The Proposed Ward is oriented to the following (check all that apply):
☐ Person ☐ Time ☐ Place ☐ Situation
- b. The Proposed Ward has a deficit in the following areas (check all areas in which Proposed Ward has a deficit):
☐ --- Short-term memory
☐ --- Long-term memory
☐ --- Immediate recall
☐ --- Understanding and communicating (verbally or otherwise)
☐ --- Recognizing familiar objects and persons
☐ --- Solve problems
☐ --- Reasoning logically
☐ --- Grasping abstract aspects of his or her situation
☐ --- Interpreting idiomatic expressions or proverbs
☐ --- Breaking down complex tasks down into simple steps and carrying them out
- c. ☐ YES ☐ NO -- The Proposed Ward's periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration.

5. Ability to Make Responsible Decisions

Is the Proposed Ward able to initiate and make responsible decisions concerning himself or herself regarding the following:

- ☐ YES ☐ NO ---- Make complex business, managerial, and financial decisions
☐ YES ☐ NO ---- Manage a personal bank account
If "YES," should amount deposited in any such bank account be limited? ☐ YES ☐ NO
☐ YES ☐ NO ---- Safely operate a motor vehicle
☐ YES ☐ NO ---- Vote in a public election
☐ YES ☐ NO ---- Make decisions regarding marriage
☐ YES ☐ NO ---- Determine the Proposed Ward's own residence
☐ YES ☐ NO ---- Administer own medications on a daily basis
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services
☐ YES ☐ NO ---- Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
☐ YES ☐ NO ---- Consent to medical and dental treatment at this point going forward
☐ YES ☐ NO ---- Consent to psychological and psychiatric treatment at this point going forward

6. Developmental Disability

- ☐ YES ☐ NO ---- Does the Proposed Ward have developmental disability?

If "NO," skip to number 7 below.

If "YES," answer the following question and look at the next page.

Is the disability a result of the following? (Check all that apply)

- ☐ YES ☐ NO ---- Intellectual Disability?
☐ YES ☐ NO ---- Autism?
☐ YES ☐ NO ---- Static Encephalopathy?
☐ YES ☐ NO ---- Cerebral Palsy?
☐ YES ☐ NO ---- Down Syndrome?
☐ YES ☐ NO ---- Other? Please explain _____

Answer the questions in the “Determination of Intellectual Disability” box below only if both of the following are true:

- (1) The basis of a proposed ward’s alleged incapacity is intellectual disability.
and
- (2) **You are making a “Determination of Intellectual Disability” in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind.**

If you are not making such a determination, please skip to number 7 below.

DETERMINATION OF INTELLECTUAL DISABILITY

Among other requirements, a Determination of Intellectual Disability must be based on an interview with the Proposed Ward and on a professional assessment that includes the following:

- 1) a measure of the Proposed Ward’s intellectual functioning;
- 2) a determination of the Proposed Ward’s adaptive behavior level; and
- 3) evidence of origination during the Proposed Ward’s developmental period.

You may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, an authorized provider, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.

1. Check the appropriate statement below. If neither statement is true, skip to number 7 below.
 - ☐ **I examined the proposed ward in accordance with rules of the executive commissioner of the Health and Human Services Commission governing Intellectual Disability examinations**, and my written findings and recommendations include a determination of an intellectual disability.
 - ☐ **I am updating or endorsing in writing a prior determination of an intellectual disability** for the proposed ward made in accordance with rules of the executive commissioner of the Health and Human Services Commission by a physician or psychologist licensed in this state or an authorized provider certified by the Health and Human Services Commission to perform the examination.
2. What is your assessment of the Proposed Ward’s level of intellectual functioning and adaptive behavior?
 - ☐ Mild (IQ of 50-55 to approx. 70)
 - ☐ Moderate (IQ of 35-40 to 50-55)
 - ☐ Severe (IQ of 20-25 to 35-40)
 - ☐ Profound (IQ below 20-25)
3. ☐ Yes ☐ No ---- Is there evidence that the intellectual disability originated during the Proposed Ward’s developmental period?

Note to attorneys: *If the above box is filled out because a determination of intellectual disability has been made in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind, a Court may grant a guardianship application if (1) the examination is made not earlier than 24 months before the date of the hearing or (2) a prior determination of an intellectual disability was updated or endorsed in writing not earlier than 24 months before the hearing date. If a physician’s or NPRN’s diagnosis of intellectual disability is not made in accordance with rules of the executive commissioner — and the above box is not filled out — the court may grant a guardianship application only if the Physician’s Certificate of Medical Examination is based on an examination the physician performed within 120 days of the date the application for guardianship was filed. See Texas Estates Code § 1101.104(a)(1).*

7. Definition of Incapacity

For purposes of this certificate of medical examination, the following definition of incapacity applies:

An “**Incapacitated Person**” is an adult who, because of a physical or mental condition, is substantially unable to:
(a) provide food, clothing, or shelter for himself or herself; (b) care for the person’s own physical health; or
(c) manage the person’s own financial affairs. Texas Estates Code § 1002.017.

8. Evaluation of Capacity

- ☐ YES ☐ NO ---- Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated **according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.**

If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

- ☐ **Total** ----- The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.
- ☐ **Partial** ----- The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

Evaluation of Capacity (continued)

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services? _____

If you answered "NO" to all of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **partially** incapacitated, please explain: _____

If you answered "YES" to any of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **totally** incapacitated, please explain: _____

9. Ability to Attend Court Hearing

- ☐ YES ☐ NO ---- The Proposed Ward would be able to attend, understand, and participate in the hearing.
- ☐ YES ☐ NO ---- Because of the Proposed Ward's incapacities, I recommend that the Proposed Ward not appear at a Court hearing.
- ☐ YES ☐ NO ---- Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding?

10. What is the least restrictive placement that you consider is appropriate for the Proposed Ward:

- ☐ ----- Nursing home level of care ☐ --- Assisted Living Facility
- ☐ ----- Group Home ☐ --- Memory care unit
- ☐ ----- Own Home or with family ☐ --- Other _____

11. Additional Information of Benefit to the Court: If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain on an additional page.

Physician/Psychologist/Advanced Practice Registered
Nurse's Signature

Date

Physician/Psychologist/Advanced Practice Registered
Nurse's Name Printed

License Number

If the examination was conducted by an Advanced Practicing Registered Nurse, the supervising physician shall sign below:

Supervising Physician's Signature

Date

Supervising Physician's Name Printed

License Number

Supported Decision-Making Agreement

This agreement is governed by the Supported Decision-Making Act, Chapter 1357 of the Texas Estates Code. This supported decision-making agreement is to support and accommodate an individual with a disability to make life decisions, including decisions related to where and with whom the individual wants to live, the services, supports, and medical care the individual wants to receive, and where the individual wants to work, without impeding the self-determination of the individual with a disability. This agreement may be revoked by the individual with a disability or his or her supporter at any time. If either the individual with a disability or his or her supporter has any questions about the agreement, he or she should speak with a lawyer before signing this supported decision-making agreement.

Appointment of Supporter:

I (Name of Adult with Disability), _____ am entering into this agreement voluntarily.

I choose (Name of Supporters) _____ to be my Supporter.

Supporters' Address: _____

Phone Number: _____

E-mail Address: _____

My Supporters may help me with life decisions about:

Yes ___ No ___ obtaining food, clothing and a place to live

Yes ___ No ___ my physical health

Yes ___ No ___ my mental health

Yes ___ No ___ managing my money or property

Yes ___ No ___ getting an education or other training

Yes ___ No ___ choosing and maintaining my services and supports

Yes ___ No ___ finding a job

Yes ___ No ___ Other: _____

My Supporters do not make decisions for me. To help me make decisions, my Supporters may:

1. Help me get the information I need to make medical, psychological, financial, or educational decisions;
2. Help me understand my choices so I can make the best decision for me; or
3. Help me communicate my decision to the right people.

Yes ___ No ___ My Supporters may see my private health information under the Health Insurance Portability and Accountability Act of 1996. I will provide a signed release.

Yes ___ No ___ My Supporters may see my educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g). I will provide a signed release.

This agreement starts when signed and will continue until _____ (date) or until my Supporters or I end the agreement or the agreement ends by law.

Signed this _____ (day) of _____ (month), _____ (year)

(Signature of Adult with Disability)

(Printed Name of Adult with Disability)

IMPORTANT INFORMATION FOR SUPPORTERS:

When you agree to provide support to an adult with a disability under this supported decision-making agreement, you have a duty to:

1. Act in good faith
2. Act loyally and without self-interest; and
3. Avoid conflicts of interest.

CONSENT OF SUPPORTER

I (Name of Supporter), _____ consent to act as a Supporter under this agreement.

(Signature of Supporter)

(Printed Name of Supporter)

CONSENT OF SUPPORTER

I (Name of Supporter), _____ consent to act as a Supporter under this agreement.

(Signature of Supporter)

(Printed Name of Supporter)

This agreement must be signed in front of two witnesses or a Notary Public.

(Witness 1 Signature)

(Printed Name of Witness 1)

(Witness 2 Signature)

(Printed Name of Witness 2)

OR

Notary Public

State of _____

County of _____

This document was acknowledged before me on _____ (date)

By _____ and _____
(Name of Adult with a Disability) (Name of Supporter)

(Signature of Notary)

(Printed Name of Notary)

(Seal, if any, of notary)

My commission expires: _____

WARNING: PROTECTION FOR THE ADULT WITH A DISABILITY

If a person who receives a copy of this agreement or is aware of the existence of this agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Department of Family and Protective Services by calling the Abuse Hotline at **1-800-252-5400** or online at **www.txabusehotline.org**.

DUTY OF CERTAIN PERSONS WITH RESPECT TO AGREEMENT

A person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement. A person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement

KEY ETHICAL ISSUES WHEN PREPARING SCHEDULES*¹

Because bankruptcy is a disclosure driven practice, much of what you discuss with your debtor client will eventually be disclosed on schedules and statement of financial affairs. Additionally, most lawyers will have a paraprofessional assist in the preparation of bankruptcy documents. These prefiling attorney-client interactions raise several important ethical issues for lawyers to consider: When does attorney-client privilege come into play? When can an attorney sign on behalf of their client? In short, what best practices should a lawyer employ for prepetition interactions with a debtor in order to avoid ethical pitfalls?

I. Are an Attorney's Intake Forms Privileged?

A. Fifth Circuit Definition of Attorney-Client Privilege

1. Attorney client privileged communications are communications made to an attorney for the primary purpose of securing either a legal opinion, legal services, or assistance in some legal proceeding, and with the intent to remain confidential. *United States v. Robinson*, 121 F.3d 971, 974, 976 (5th Cir. 1997).
2. Two exceptions to the privilege are communications made for the purpose of committing a crime or fraud or where the privilege was waived by the privilege holder. *United States v. Kelly*, 569 F.2d 928,938 (5th Cir. 1978).

B. Relevant Case Law

1. The majority of courts hold that the attorney-client privilege does not protect information given to a lawyer to prepare bankruptcy documents (like an intake questionnaire) because the debtor has no expectation of privacy when the information will ultimately be put into publicly filed schedules and statements. *In re White*, 950 F.2d 426 (7th Cir. 1991).
2. A Southern District of Texas Court held that the debtors and their counsel were not required to turnover a copy of the questionnaire completed prior to filing for Chapter 7 relief or draft schedule prepared by their attorney given the specific facts before the Court, but the draft schedules prepared by debtors was discoverable. *In re McDowell*, 483 B.R. 471 (Bankr. S.D. Tex. 2012).
3. Upon filing a bankruptcy case, a trustee for a corporate debtor holds the privilege and can waive that privilege; however, a trustee cannot waive the privilege for an individual debtor. *In re Bounds*, 443 B.R. 729, 735 (Bankr. W.D. Tex. 2010).

* Any views expressed are those of the speaker and do not necessarily represent the views of and should not be attributable to the United States Trustee Program or the U.S. Department of Justice.

C. Practical takeaways:

1. Bankruptcy is a disclosure driven practice, so assume draft schedules may be turned over during discovery.
2. Encourage debtors to ask questions about intake forms (ex: all real property with an ownership interest anywhere in world, not just Texas or the United States). If you discover facts on the schedules are inaccurate, amend as soon as possible.

II. Signatures on the Petition and Schedules

A. Fed. R. Bankr. P. 1008

A petition, list, schedule, statement, and any amendment must be verified or must contain an unsworn declaration under 28 U.S.C. § 1746.

B. Fed. R. Bankr. P. 9011

(a) Signature. Every petition, pleading, written motion, and other document—except a list, schedule, or statement, or an amendment to one of them—must be signed by at least one attorney of record in the attorney’s individual name. A party not represented by an attorney must sign all documents. Each document must state the signer’s address and telephone number, if any. The court must strike an unsigned document unless the omission is promptly corrected after being called to the attorney’s or party’s attention.

(b) Representations to the Court. By presenting to the court a petition, pleading, written motion, or other document—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that, to the best of the person’s knowledge, information, and belief formed after an inquiry reasonable under the circumstances:

- (1) it is not presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase litigation costs;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument to extend, modify, or reverse existing law, or to establish new law;
- (3) the allegations and factual contentions have evidentiary support—or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence—or if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that (b) has been violated, the court may, subject to the conditions in this subdivision (c), impose an appropriate sanction on any attorney, law firm, or party that committed the violation or is responsible for it. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *By Motion.*

(A) *In General.* A motion for sanctions must be made separately from any other motion or request, describe the specific conduct alleged to violate (b), and be served under Rule 7004.

(B) *When to File.* The motion for sanctions must not be filed or presented to the court if the challenged document, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected within 21 days after the motion was served (or within another period as the court may order). This limitation does not apply if the conduct alleged is filing a petition in violation of (b).

(C) *Awarding Damages.* If warranted, the court may award to the prevailing party the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(3) *By the Court.* On its own, the court may enter an order describing the specific conduct that appears to violate (b) and directing an attorney, law firm, or party to show cause why it has not violated (b).

(4) *Nature of a Sanction; Limitations.*

(A) *In General.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or deter comparable conduct by others similarly situated. The sanction may include:

- (i)** a nonmonetary directive;
- (ii)** an order to pay a penalty into court; or
- (iii)** if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of all or part of the reasonable attorney's fees and other expenses directly resulting from the violation.

(B) *Limitations on a Monetary Sanction.* The court must not impose a monetary sanction:

- (i)** against a represented party for violating (b)(2); or
- (ii)** on its own, unless it issued the show-cause order under (c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(5) *Content of a Court Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. Subdivisions (a)–(c) do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to Rules 7026–7037.

(e) Verifying a Document. A document filed in a bankruptcy case need not be verified unless these rules provide otherwise. When these rules require verification, an unsworn declaration under 28 U.S.C. § 1746 suffices.

(f) Copies of Signed or Verified Documents. When these rules require copies of a signed or verified document, if the original is signed or verified, a copy that conforms to the original suffices.

C. Local Rule S.D. Tex. R. 5005-1 Filing of Papers and Signatures.

(a) Except as set forth in this rule, the Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts (as amended January 12, 2017) are adopted. The current version is available on the Court’s website. Page 27 October 29, 2024

(b) Signatures of debtors, attorneys, affiants and declarants may be either (i) received and maintained in “wet signature form”; or (ii) electronically signed utilizing a commercially available electronic signing technology (such as DocuSign) that (a) maintains an audit trail that allows the filing attorney to obtain the identification of the signer’s computer or other electronic device from the commercial provider; and (b) complies with the requirements of the United States ESIGN Act.

D. Southern District of Texas Cases

1. Court held the inclusion of Chapter 7 debtor’s counsel’s signature in section 17 of the original petition for relief violated Bankruptcy Rules 1008, 5005 and 9011 along with Bankruptcy Local Rules 1001-1 and 5005-1 as debtor’s counsel was not permitted to sign the voluntary petition in lieu of an authorized debtor representative. Further the Court held debtor’s counsel did not make a reasonable inquiry into the assets and liabilities of the debtor before filing either the original petition or amended petition. Counsel also failed to timely file the Declaration for Electronic Filing for the petition and failed to obtain an original signature from the authorized debtor representative. The severity of these violations encouraged the Court to award attorney fees to the petitioning creditor “to deter repetition of such conduct” under Bankr. Rule 9011(c). *In re Semco Mfg. Co.*, 649 B.R. 155 (Bankr. S.D. Tex. 2023).
2. Counsel’s failure to personally meet with and review schedules and statements and obtain his client’s signature before filing the documents with the Court prompted an Order to Show Cause because “the case at bar is the sixth time...[the attorney’s] poor conduct has caught this Court’s attention.” *See In re Stomberg*,

487 B.R. 775 (Bankr. S.D. Tex. 2013). The Court found debtor's counsel violated Bankruptcy Rule 9011(b) and found sanctions proper under 9011(c). Further, the Court held debtor's counsel violated Bankruptcy Rule 5005 and guidelines for professional conduct on multiple occasions resulting in a lengthy memorandum opinion outlining his misconduct.

E. Practical takeaways:

1. Retain wet client signatures in your files.
2. Remember prior to signing a bankruptcy petition, you have a duty to make a reasonable inquiry as to the accuracy of the information filed on the docket.

Southern District of Texas Bankruptcy Consumer CLE Ethics

Client Confidences

Texas Disciplinary Rule of Professional Conduct 1.05: Confidentiality of Information

- (a) “Confidential information” includes both “privileged information” and “unprivileged client information.” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
- (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
 - 1. Reveal confidential information of a client or a former client to:
 - i. a person that the client has instructed is not to receive the information; or
 - ii. anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

Exceptions to Confidentiality

Texas Disciplinary Rule of Professional Conduct 1.05: Confidentiality of Information

(c) A lawyer may reveal confidential information:

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.
- (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
- (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
- (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
- (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.
- (9) To secure legal advice about the lawyer's compliance with these Rules.**
- (10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

Withdrawal

Texas Disciplinary Rule of Professional Conduct 1.15: Declining or Terminating Representation

- a) A lawyer shall decline to represent a client or, where representation has commenced, ***shall withdraw***, except as stated in paragraph (c), from the representation of a client, if:
 - 1. the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;
 - 2. the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client; or
 - 3. the lawyer is discharged, with or without good cause.
- b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:
 - 1. withdrawal can be accomplished without material adverse effect on the interests of the client;***
 - 2. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;
 - 3. the client has used the lawyer's services to perpetrate a crime or fraud;
 - 4. a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
 - 5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - 6. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - 7. other good cause for withdrawal exists.

Bankruptcy Rule 9011

Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) Signature. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Bankruptcy Rule 9011

Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers (cont'd)

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Bankruptcy Rule 9011

Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers (cont'd)

- (c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

Bankruptcy Rule 9011

Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers (cont'd)

(2) ***Nature of Sanctions; Limitations.*** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) ***Order.*** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

- (d) **Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.
- (e) **Verification.** Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.
- (f) **Copies of Signed or Verified Papers.** When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Dismissal of a case or conversion to a case under chapter 11 or 13

Bankruptcy Code Section 707(b)(4)

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if—

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court—

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court find that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

Dismissal of a case or conversion to a case under chapter 11 or 13 Bankruptcy Code Section 707(b)(4) (cont'd)

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

Preventing Fraud

- **Texas Disciplinary Rule of Professional Conduct 1.05(c):** Scope and Objectives of Representation
(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or Fraudulent...
- **Texas Disciplinary Rule of Professional Conduct 3.01:** Meritorious Claims & Contentions
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Disclosing Fraud

- **Texas Disciplinary Rule of Professional Conduct 3.03:** Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
- (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision
- (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

HYPOTHETICAL

You represent a client with a shopping problem. Client hires you in connection with his Chapter 13 filing. Debtor's Schedules reflect numerous credit card debts along with the following statement: "Debtor listed the balance shown on last statement, debtor not presently able to determine if balance is correct and is uncertain if trade name is correct legal creditor."

If the lawyer knows the client could obtain accurate balances, does it matter than a lawyer doesn't have to sign the Debtor's Schedules under penalty of perjury?

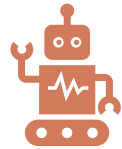
Twenty credit card companies filed claims against the debtor. The debtor files identical objections to the claims, stating that he had received the claim but "cannot determine that the amount stated on the claim is accurate because there are no ledgers or other accounting records attached to the proof of claim." Due to this lack of documentation provided by the claimant, the debtor said he cannot verify the account. Many of those creditors did not respond to the debtor's lack of documentation objection.

Is this a valid objection? Is a court required to sustain the objections without a hearing?

A FEW THOUGHTS ABOUT AI



WHAT IS AI?



“AI is the “intelligence” of software or a machine that has the capacity to learn, make decision, and take action.”
Artificial Intelligence and ChatGPT: Friend, Foe, or Both,
P. Wechsler, ALM, July 25, 2023.



Examples of AI:

Google
Alexa
Siri



Generative AI

Beware of Hallucinations

Attorney “submitted non-existent judicial opinions with fake quotes and citations created by *** ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.”

Mata v. Avianca, Inc.,

678 F. Supp.3d 443 (S.D.N.Y. 2023)

(No. 22-cv-1461 (PKC))

- Rule 11 violated (bad faith finding)
- Firm jointly and severally liable
- No sanctions under 28 U.S.C. § 1927
- \$5,000 penalty imposed jointly and severally
- Notice of conduct and sanction to their client and the judges whose names were wrongfully invoked



Court not happy



**Appellant's brief cited
published cases that
do NOT exist**

Training & Education for Law Firms

(according to ChatGPT, Esq.)

- Law firms should consider several types of AI training for their lawyers and staff to ensure they are equipped to leverage the benefits of AI in their practice effectively and ethically. Here are some key areas of training:
 - Basic AI Literacy: Understanding what AI is, how it works, and its potential applications in the legal field. This includes an overview of machine learning, natural language processing, and data analytics.
 - Ethical Considerations and Bias Awareness: Training on the ethical use of AI in legal practice, focusing on issues like bias in AI systems, data privacy, and the implications of using AI in decision-making processes.
 - Legal Research Tools: Many AI-powered tools are available for legal research and document analysis. Training on how to use these tools effectively can greatly enhance efficiency and accuracy.
 - Document Automation and Management: AI can automate routine tasks such as document drafting and management. Training on using these tools can save time and reduce errors.



Example from ChatGPT

- **Question: should I withdraw from my client's case as their bankruptcy attorney?**
- Answer: Withdrawing as an attorney in a bankruptcy case is a serious decision that should be carefully considered. It can affect not only your relationship with your client but also the progress and outcome of the bankruptcy case itself. Here are some factors to think about before deciding whether to withdraw from representing your client in a bankruptcy matter:
- **1. Reason for Withdrawal**
- First, you need to assess the reason for considering withdrawal. Common reasons why an attorney might need or choose to withdraw from a bankruptcy case include:
- **Conflict of Interest:** If a conflict of interest arises during the case that prevents you from providing unbiased representation, you may need to withdraw.
- **Client's Non-cooperation:** If your client is failing to provide necessary information, missing deadlines, or otherwise obstructing the process, this might make continued representation untenable.
- **Non-payment of Fees:** If your client is unable or unwilling to pay for your services, and you have no agreement in place for handling unpaid fees, this could justify withdrawal.
- **Ethical Issues:** If you believe that your client is not being truthful or is engaging in fraudulent activity (e.g., concealing assets, filing inaccurate forms), you might have an ethical obligation to withdraw.
- **Personal or Professional Reasons:** Sometimes personal health issues or professional conflicts can make it difficult to continue representing a client.
- **2. Procedural Requirements for Withdrawal**
- If you decide that withdrawal is necessary, you must follow the appropriate legal procedures:
- **Motion to Withdraw:** In most bankruptcy cases, you will need to file a **motion to withdraw** with the bankruptcy court. The motion should be filed with a statement explaining the reasons for withdrawal. However, some jurisdictions may allow for a simple notice of withdrawal.
- **Notice to the Client and Other Parties:** You will need to provide notice to your client and all other parties involved in the case (such as creditors and the trustee). In bankruptcy, timely notice is crucial to ensure that the case does not get delayed or complicated by your withdrawal.
- **Court Approval:** The bankruptcy court must approve your withdrawal, especially if the client has not secured alternative legal representation. The court may deny the motion to withdraw if they determine that your withdrawal would prejudice the client or delay the proceedings.
- **Rule 2016(b)** of the Bankruptcy Code requires attorneys to disclose compensation arrangements, and withdrawal may impact how fees are handled if the case is in progress

Example Continued...

- **3. Timing of Withdrawal**

- The timing of your withdrawal is very important. If you withdraw at an inappropriate time (such as shortly before a critical deadline or a hearing), it could severely harm your client's case. Ensure that:
- **Adequate Time for Substitution:** Your client has enough time to hire new counsel or the court has sufficient time to appoint a new attorney.
- **No Disruption to the Case:** Try to withdraw at a time that minimizes disruption to the bankruptcy process. If possible, avoid withdrawing right before or during important hearings or filing deadlines.

- **4. Impact on Your Client**

- **Effect on the Case:** Understand how your withdrawal could impact the client's bankruptcy proceedings. Will it cause delays? Is it likely to harm their chances of a successful discharge or reorganization? If you are in the midst of a Chapter 7 or Chapter 13 case, your withdrawal might delay things, especially if it's difficult for the client to find another attorney.
- **Client's Interests:** If you are withdrawing because of ethical concerns or non-cooperation from the client, make sure to safeguard the client's interests. For example, in a Chapter 7 case, you might want to ensure that the client has filed all the necessary paperwork and made the required disclosures before your withdrawal.
- **Fee Arrangements:** If you have already been paid, withdrawing could complicate the issue of fees. If fees are unpaid or there is a dispute over them, you may need to explain the situation in your motion and may be required to file a fee application with the court. Some jurisdictions have specific rules about how fees should be handled when an attorney withdraws.

- **5. Consider Alternative Solutions Before Withdrawal**

- Before deciding to withdraw, consider if there are any ways to resolve the issues without ending your representation:
- **Communication:** If the issue is a lack of cooperation or non-payment of fees, sometimes having a candid conversation with the client can resolve the problem.
- **Substitution of Counsel:** If your client agrees, you may be able to arrange for a substitution of counsel rather than withdrawing entirely.
- **Limited Representation:** In some cases, it may be possible to reduce the scope of your representation (e.g., representing the client at hearings but not handling the full case). This may be an option if the issues are limited.

- **6. Ethical and Professional Considerations**

- As a bankruptcy attorney, you have professional and ethical duties to your client. Withdrawing in a way that causes harm to your client or results in delays could lead to ethical concerns or even a malpractice claim. Be sure that your withdrawal complies with the ethical rules governing attorneys in your jurisdiction (such as the **ABA Model Rules of Professional Conduct** and local bar rules).

- **7. Effect on the Bankruptcy Process**

- Keep in mind that in Chapter 13 bankruptcy, the court and the trustee are often involved in approving the debtor's repayment plan, and in Chapter 7, the case could be delayed without legal counsel. The bankruptcy process is complex, and even if you feel that your relationship with your client is untenable, it's important to consider whether withdrawing will result in further complications for the client.

Example Continued...

- Example Motion Outline for Withdrawal: Here's a simple example of what a motion to withdraw might look like:
- IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF [YOUR DISTRICT]
- [Debtor's Name],
- Debtor.
- Case No. [xxxxxxx]
- Chapter [7/13]
- MOTION TO WITHDRAW AS COUNSEL FOR THE DEBTOR
- [Your Name], attorney for the debtor, hereby moves this Court for an order allowing withdrawal as counsel for the debtor, and in support thereof states as follows:
- [Your Client's Name] (the "Debtor") filed a petition under Chapter [7/13] of the Bankruptcy Code on [Date]. Counsel is requesting to withdraw from representing the Debtor because [state reason: e.g., non-payment of fees, client's failure to cooperate, conflict of interest, personal reasons, etc.]. [If applicable, state that the debtor has been notified and given adequate time to retain new counsel.] Counsel has made reasonable efforts to ensure that the Debtor's interests are not prejudiced by withdrawal, and that the bankruptcy process can continue without delay.
- WHEREFORE, Counsel respectfully requests that the Court grant the motion to withdraw as counsel and for such other relief as the Court deems appropriate.
- Dated: [Date][Attorney's Name][Attorney's Address][Attorney's Phone Number][Attorney's Email Address]



Test: Does 11 U.S.C. § 1325(b)(1) allow a chapter 13 debtor to exclude from the calculation of disposable income voluntary, post-petition contributions to his or her 401(k) retirement plan

- **ChatGPT:** Yes, 11 U.S.C. § 1325(b)(1) does allow a Chapter 13 debtor to exclude voluntary, post-petition contributions to their 401(k) retirement plan from the calculation of disposable income, but this exclusion has some important nuances that need to be considered.
 - Key Case Law Supporting Exclusion:
 - 1. **In re Hartwick, 500 B.R. 468 (Bankr. D. Or. 2013)** The court held that voluntary post-petition contributions to a 401(k) were a valid deduction when calculating disposable income in a Chapter 13 case. It concluded that the debtor's contributions were in the nature of a necessary expense and excluded from the disposable income calculation.
 - 2. **In re Lenton, 426 B.R. 32 (Bankr. D. Mass. 2010)** Similarly, the court in Lenton allowed the debtor to exclude voluntary, post-petition 401(k) contributions in the calculation of disposable income, reasoning that contributions to retirement plans are part of a debtor's reasonable expenses, particularly where they are made to maintain the debtor's long-term financial health.
 - 3. **In re Wiegand, 386 B.R. 238 (Bankr. E.D. Wis. 2008)** The Wiegand case found that voluntary contributions to a 401(k) were properly excluded from disposable income. The court emphasized that the debtor's retirement savings were important for long-term financial security, and not contributing to a retirement plan could result in the debtor eventually becoming dependent on public assistance.
- **Google AI Analysis:** According to the majority interpretation of 11 U.S.C. § 1325(b)(1), a Chapter 13 debtor can generally exclude voluntary, post-petition contributions to their 401(k) retirement plan from the calculation of disposable income; meaning these contributions are not considered part of the income available to creditors in a Chapter 13 plan.
 - Section 541(b)(7): This section of the Bankruptcy Code is often cited as supporting the exclusion of voluntary retirement contributions from disposable income.
- **Snapchat AI:** Actually, 11 U.S.C. § 1325(b)(1) has been interpreted by some courts to allow Chapter 13 debtors to exclude voluntary, post-petition contributions to their 401(k) retirement plans from the calculation of disposable income. However, this can vary depending on the specific court and jurisdiction. It's always a good idea to consult with a bankruptcy attorney to get advice tailored to your specific situation.
 - **In re Johnson, 346 B.R. 256 (Bankr. S.D. Ga. 2006)**, where Court allowed post-petition 401(k) contributions to be excluded from disposable income.
 - **In re Mati, 390 B.R. 11 (Bankr. D. Mass. 2008)**, which also supported this interpretation. However, interpretations can vary, so it's always good to check the latest rulings in your jurisdiction.

The 2nd Annual Southern District of Texas Consumer Bankruptcy Conference

The Bankruptcy Petition Preparer

Presented at Houston Texas

January 16, 2025

by

Chief Bankruptcy Judge Eduardo V. Rodriguez

Mr. Andrew Jiménez, Trial Attorney for the U.S.T.

Mr. Brendon Singh, Attorney

Why should you care?

- Protect the public from the unauthorized practice of law.
- Understand the restrictions on the activities of BPPs to effectively represent consumer debtors who are victims of BPPs.
 - Prohibitions on activities of BPPs.
 - Fines and recovery of attorney's fees and costs.
- Help eradicate the illicit activities of BPPs.
 - If you see something, say something.

What is a bankruptcy petition preparer?

- A bankruptcy petition preparer is:
 - a person, other than an attorney for the debtor or an employee of such attorney under the supervision of such attorney,
 - who prepares for compensation a document for filing.
- **11 U.S.C. § 110(a)(1)**

What is a document for filing?

- A document for filing is
 - a petition or any other document prepared for filing
 - by a debtor in a United States bankruptcy court or a United States district court
 - in connection with a bankruptcy case.
- **11 U.S.C. § 110(a)(2)**

What a BPP is required to do:

- A BPP who prepares a document for filing shall
 - sign the document and
 - print on the document the BPP's name and address.
- If the BPP is not an individual, then
 - an officer, principal, responsible person, or partner of the BPP is required to sign and print name and address on the document.
- **11 U.S.C. § 110(b)(2)(A)**

What a BPP is required to do:

- Provide to the debtor, before preparing any document for filing or accepting any fee, a written notice which must:
 - inform the debtor in simple language that a BPP is not an attorney and may not practice law or give legal advice.
 - be signed by the debtor and, under penalty of perjury, by the BPP.
 - be filed with any document for filing.
- **11 U.S.C. § 110(b)(2)(B)**

What a BPP is required to do:

- Place on the document, after the BPP's signature,
 - an identifying number that identifies individuals that prepared the document.
 - Social Security account number of each individual who prepared a document or assisted in its preparation.
- **11 U.S.C. § 110(c)**

What a BPP is required to do:

- File a declaration under penalty of perjury together with the petition,
 - disclosing any fee received from or on behalf of the debtor within 12 months immediately prior to the filing of the case, and
 - any unpaid fee charged to the debtor.
- **11 U.S.C. § 110(h)(2)**

What a BPP shall not do:

- Execute any document on behalf of a debtor.
- Offer a potential bankruptcy debtor any legal advice, including :
 - Whether to file a bankruptcy petition; or whether commencing a case under chapter 7, 11, 12, or 13 is appropriate.
 - Whether the debtor's debts will be discharged in a bankruptcy case.
 - Whether the debtor will be able to retain his/her home, car, or other property after commencing a bankruptcy case.
 - Tax consequences of a case and the dischargeability of tax claims.
 - Whether the debtor should enter into reaffirmation agreements.
 - How to characterize the nature of debtor's interest in property or the debtor's debts.
- **11 U.S.C. §110(e)**

What a BPP shall not do:

- Use the word “legal” or any similar term
 - in any advertisements or
 - advertise under any category that includes the word “legal” or any similar term. 11 U.S.C. § 110(f)
- Not collect or receive any payment from the debtor or on behalf of the debtor for filing fees.
- **11 U.S.C. § 110(g)**

Damages for violating 11 U.S.C. § 110

- If a BPP violates section 110 of the Bankruptcy Code or commits any acts that the court finds to be fraudulent, unfair, or deceptive The court shall order the BPP to pay the debtor:
 - The debtor's actual damages;
 - The greater of \$2,000, or twice the amount paid by the debtor to the BPP for the preparer's services;
 - Reasonable attorney's fees and costs in moving for damages.
- **11 U.S.C. § 110(i)(1).**

Civil action to enjoin a BPP

- A debtor, the trustee, a creditor, or the U.S. Trustee may bring a civil action to enjoin a BPP from engaging in any conduct in violation of section 110 of the Bankruptcy Code or from further acting as a BPP.
- **11 U.S.C. § 110(j)(1).**

Fines for violating 11 U.S.C. § 110

- A BPP who fails to comply with any provision of subsection (b), (c), (d), (e), (f), (g), or (h) may be fined not more than \$500 for each failure.
- The court shall triple the amount of the fine in any case in which the court finds that a BPP:
 - Advised the debtor to exclude assets or income that that should have been included on applicable schedules.
 - Advised the debtor to use a false social security number.
 - Failed to inform the debtor that the debtor was filing for bankruptcy.
 - Prepared a document for filing in a manner that failed to disclose the identity of the BPP
- **11 U.S.C. § 110 (I)**

In re Rodarius Mitchell, 652 B.R. 731 (S.D. Tex. 2023)

- This Court writes the instant memorandum opinion as a warning to all persons who recklessly guide vulnerable debtors into bankruptcy without regard for the consequences.
- Over the past several months, there has been a concerning spike in bankruptcy petition preparer cases before this Court.
- Here, the BPP repeatedly violated numerous sections of 11 U.S.C. §110, and, as a result, has greatly harmed the lives of many.
- Section 110 provides harsh sanctions for those who fail to comply, and this Court intends to fully enforce such measures when applicable.

In re Rodarius Mitchell, 652 B.R. 731 (S.D. Tex. 2023)

- Facts:
- On April 14, 2023, the Court opened this Miscellaneous Proceeding in order to consolidate numerous matters in which a bankruptcy petition preparer allegedly violated 11 U.S.C. § 110.
- In total, seven debtors were added to this Miscellaneous Proceeding.
- Finding:
- The Court found that the BPP served as a bankruptcy petition preparer under 11 U.S.C. § 110(a)(1) for three of the debtors.
- The BPP violated 11 U.S.C. § 110(b)(1), (b)(2), (c)(1), (e)(2)(A) and (h)(2) as to each of the three debtors.

In re Rodarius Mitchell, 652 B.R. 731 (S.D. Tex. 2023)

- Holding:
- Within the Southern District of Texas Bankruptcy Courts, the BPP was enjoined from:
 - (i) giving, providing, or offering advice and counsel to any person regarding their eligibility to file bankruptcy or the consequences to them of filing a bankruptcy case under Title 11 of the United States Code;
 - (ii) encouraging, counseling, advising or assisting any person with filing a bankruptcy case under Title 11 of the United States Code; and
 - (iii) engaging in the unauthorized practice of law, as defined in §§ 81.101 and 81.102 Tex. Govt. Code Ann.
- Furthermore, the fees obtained by the BPP were forfeited and the BPP must reimburse debtors.

In re Rodarius Mitchell, 652 B.R. 731 (S.D. Tex. 2023)

- Further Holding:
- Section 110(l)(1) states, “[a] bankruptcy petition preparer who fails to comply with any provision of subsection (b), (c), (d), (e), (f), (g), or (h) may be fined not more than \$500 for each such failure.”
- The Court determined that the BPP violated 11 U.S.C. § 110(b)(1), (b)(2), (c)(1), (e)(2)(A) and (h)(2) with respect to the three debtors.
- These five violations across each of the three debtor's cases resulted in fifteen total violations.
- Given that the BPP failed to disclose his involvement and recklessly guided numerous individuals into bankruptcy without knowledge of the implications.
- The Court found that it was appropriate to impose a fine of \$500.00 for each violation, resulting in a total of \$7,500.00.

In re Rodarius Mitchell,
652 B.R. 731(S.D. Tex. 2023)

- Further, section 110(1)(2) provides, “[t]he Court shall triple the amount of a fine assessed under paragraph (1) in any case in which the court find that a bankruptcy petition preparer...prepared a document for filing in a manner that failed to disclose the identity of the bankruptcy petition preparer.”
- Here, the BPP did not disclose his identity on any of the three debtors' petitions.
- Thus, the Court finds cause to triple the \$7,500.00 fine for a total fine of \$22,500.00.

In re Alvaro Flores, 652 B.R. 276 (S.D. Tex. 2023)

- Facts
- The Debtor's non-filing spouse testified that she discovered Auto Recovery Partners, LLC's ("Auto Recovery") contact information online and reached out to them after her husband's car was repossessed.
- Auto Recovery advised Debtor's non-filing spouse that bankruptcy was one way to prevent the vehicle from being repossessed.
- Auto Recovery provided a checklist of instructions on how to file a chapter 13 bankruptcy.
- Auto Recovery charged \$1,250 but received only \$925.
- None of the individuals employed by Auto Recovery is an attorney.

In re Alvaro Flores, 652 B.R. 276 (S.D. Tex. 2023)

- Holding
- “Nonetheless, Auto Recovery Partners, LLC's distinction is without merit. An identical argument was raised in *In re Martinez* and the Fifth Circuit concluded that the debtor's spouse was not a disinterested party since Texas is a community property state. As such, the bankruptcy estate included certain interests of the debtor and the debtor's spouse. Thus, as in *In re Martinez*, Auto Recovery Partners, LLC's first argument is meritless.”

In re Alvaro Flores, 652 B.R. 276 (S.D. Tex. 2023)

- “Parker testified that she discovered these instructions online and had no personal knowledge as to the implications of filing chapter 13 or what paying the filing fee in installments meant.
- This reckless behavior from Auto Recovery Partners, LLC is precisely the conduct Congress aimed to guard against with the passage of § 110.
- Therefore, even though a representative of Auto Recovery Partners, LLC did not physically fill out the forms, Auto Recovery Partners, LLC's conduct still constitutes “preparing” the chapter 13 petition under § 110(a)(1).
- As such, Auto Recovery Partners, LLC's second argument is without merit.”

In re Treshun Trinelle Davis, 2023 WL 4629434 (S.D. Tex. 2024)

- “In this case, the danger of a bankruptcy petition preparer offering legal advice is particularly apparent. Not only did Auto Recovery Partners, LLC recklessly advise Treshun Davis to file chapter 13 without any understanding of the implications, but they were still unable to recover Davis’s car.”
- “The fact that Auto Recovery Partners, LLC encouraged Davis to file bankruptcy to recover his vehicle without first checking who’s name the car was registered to, shows the severe threat that those unqualified to practice law pose to potential debtors.”

In re Pollizzio, 23-34727 (S.D. Tex. 2024)

- Lift Foreclosure and Tyler Gregerson were found to be a BPP as defined under 11 U.S.C. § 110.
- The Court ordered the BPP to disgorge the fees paid by the Debtor and reimburse the Debtor for attorney's fees.
- Here the BPP signed the voluntary petition on behalf of the Debtor and filed such petition without Debtor's knowledge.
- The Court ordered the sealing of the bankruptcy case docket to protect the Debtor.
- The Court found reasonable grounds to believe that an investigation by the United States Attorney for potential crimes was warranted.

Potential Remedies

- Court may:
 - order BPP to disgorge all fees and costs
 - impose a restraining order on the BPP from any further filings in the S.D. of Tex.
 - refer the BPP to the State Bar of Texas for the unauthorized practice of law
 - refer the BPP to the Department of Justice for any violations of Title 18
 - impose fines on the BPP payable to the U.S.T.
 - reimburse attorney's fees for assisting the Debtor
 - seal the debtor's bankruptcy filing if requested and merited
 - Strike the petition to allow them to refile it properly with the assistance of competent counsel

Thank You!

Motion Practice, Adversaries and Evidence

Tips, Techniques, and Insights for Practitioners

2nd Annual Southern District of Texas
Consumer Bankruptcy Conference
January 16, 2025

Moderator:

Hon. Alfredo Perez, U.S. Bankruptcy Judge

Panelists:

Reece Baker, Baker & Associates, Houston, TX
Stephen Wilcox, Wilcox Law, Arlington, TX
Marcos Oliva, Oliva Law, McAllen, TX





Motion Practice in Bankruptcy

- Relief from the Automatic Stay - See 11 U.S.C. § 362 (g)
 - Confirmation: Plan, Modifications, Valuation of Collateral, Objections
 - Dismiss or Convert (Chapter 13 vs Chapter 7)
 - Extend or Impose Stay
 - Claim Objections, Avoid Liens, Turnover
 - Incur Debt, Redeem
 - Employ Professionals, Approve Settlements
 - Examination under Bankruptcy Rule 2004, Local Rule 2004-1
 - Use, Sale or Lease of Property
 - Appoint Bankruptcy Representative (for Deceased or incapacitated)
 - Waive requirements for Discharge / Hardship Discharge
 - Sanctions (Violation of the Stay, Failure to Turnover, Discovery abuse)
 - Extend Deadlines
 - Administrative Claims

Motion Practice in Bankruptcy

- **Key Considerations:**
 - Jurisdiction and procedural rules (Federal Rules of Bankruptcy Procedure, Local Rules).
 - Standards of proof and judicial discretion
- **Best Practices:**
 - Drafting clear and persuasive pleadings.
 - Avoiding procedural pitfalls.



Adversary Proceedings

- **Stages of Adversary Proceedings:**
 - Pleadings, discovery, pre-trial, trial.
- **Strategies for Success:**
 - Building a strong factual record.
 - Efficient use of case law and precedents.

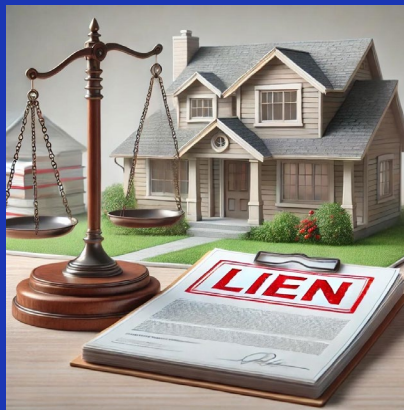


Outline of an Adversary

1. Complaint
2. Summons- fill out, file, get back and serve. Service can be by mail. Suggested to use Certified mail, return receipt requested to prove service
3. Failure to file an answer- motion for default
 - a. See notes from Judge Norman's website on default issues
4. Scheduling conference / Pre-Trial
 - a. See the "Standard Joint Pretrial Statement" as Appendix C to the Local Rules

Case Studies

- **Example 1:** Avoid Judgment Lien on Home.
- **Example 2:** Challenge the validity of solar panel lien on Home.



Motion Practice
11 U.S.C. § 522



Adversary
Bankruptcy Rule 7001

Practical Tips and Strategies

- Always meet and confer before filing.
- Address potential objections preemptively.
- Focus on creating a compelling narrative.
- Leverage stipulations to narrow disputes.
- Anticipate objections; know your evidentiary foundations.
- Use technology (e.g., courtroom presentation software).

- Documentary (financial records, emails).
- Testimonial (debtor, creditor, experts).
- Demonstrative (timelines, charts).
- Federal Rules of Evidence: Relevance, hearsay exceptions, authentication.
- Missing deadlines for disclosures.
- Insufficient authentication of key documents.
- Organize exhibits clearly with trial binders or digital formats.
- Practice direct and cross-examinations.

Lay Opinion and Expert Testimony

- Importance of testimony in legal proceedings
- Differentiating lay opinions from expert testimony
- Statutory frameworks and key case law
- Practical implications for attorneys and courts

What are the differences between expert and lay testimony?



Lay Testimony

Governed by Federal Rule of Evidence 701

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the **witness's perception**;
- (b) **helpful to clearly understanding** the witness's testimony or **to determining a fact in issue**; and
- (c) **not based on scientific, technical, or other specialized knowledge** within the scope of Rule 702.

Expert Testimony

Governed by Federal Rule of Evidence 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert's **scientific, technical, or other specialized knowledge** will **help the trier of fact** to understand the evidence or to determine a fact in issue;
- (b) the testimony is **based on sufficient facts or data**;
- (c) the testimony is the **product of reliable principles and methods**; and
- (d) the expert's **opinion reflects a reliable application of the principles and methods to the facts of the case**.

Admissibility Standards for Expert Testimony

- **Frye Standard:** General acceptance test (pre-*Daubert*)
- And then in ***Daubert v. Merrell Dow Pharmaceuticals***:

Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “ ‘general acceptance,’ ” the assertion that the Rules somehow assimilated Frye is unconvincing. **Frye made “general acceptance” the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.**

- *Daubert v. Merrell Dow Pharmaceuticals*: Established criteria for admissibility
- Relevance and reliability of methods “ . . . under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”
- Federal Rule 702 codifies admissibility requirements

Practical Challenges in Court

- Distinguishing lay opinions from expert testimony
- Cross-examining experts effectively
- Addressing *Daubert* motions and challenges
- Practical advice for attorneys in presenting testimony

ETHICAL CONSIDERATIONS

- Avoiding conflicts of interest in expert testimony
- Ensuring truthful and unbiased opinions
- Ethical responsibilities of attorneys and experts

Key Takeaways

- Understanding the rules for lay and expert testimony is crucial
- Adherence to statutory and case law ensures admissibility
- Preparation and strategy are key to presenting persuasive testimony
- Staying informed about emerging trends is essential

Questions and Discussion

Lay Opinion and Expert Testimony

A Legal Overview

Overview of Lay and Expert Testimony

- Importance of testimony in legal proceedings
- Differentiating lay opinions from expert testimony
- Statutory frameworks and key case law
- Practical implications for attorneys and courts

Defining Lay Testimony

Governed by Federal Rule of Evidence 701

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;**
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and**
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.**

Washington v. Dep't of Transp., 8 F.3d 296 (5th Cir. 1993)

“Under the Federal Rules of Evidence, **speculative opinion testimony by lay witnesses—i.e., testimony not based upon the witness's perception—is generally considered inadmissible**. At trial, Thomas attempted to testify as to what he *would have done* had he seen the warning label on the Shop Vac vacuum. Because such testimony would not have been based upon Thomas's perception, but upon his self-serving speculation, we hold that the district court did not abuse its discretion in excluding this evidence.”

McCormick on Evidence (MCMK-EVID § 11)

“ In the words of Federal Rule 701(a), these opinions must be ‘rationally based on the witness’s perception.’ It is not enough that the opinion has some basis in the witness’s personal knowledge. **The inclusion of the adverb ‘rationally’ signals that the judge must decide whether, as a matter of logic, the extent of the witness’s knowledge is sufficient to support the proffered opinion.**”

United States v. Sanjar, 876 F.3d 725
(5th Cir. 2017)

“The challenged testimony satisfies these requirements. Each patient spoke only to his or her condition. **The testimony assisted the jury in determining whether patients required PHP services.** And, even if the statements implicate specialized knowledge, **they were informed by the patient’s experience**—they are the ones living with the mental illnesses. Allowing this testimony was not erroneous.”

McCormick on Evidence (MCMK-EVID § 11)

“Rule 701 codifies helpfulness/convenience as the standard. Rather than restricting lay opinion to cases of strict necessity, Rule 701 authorizes the receipt of any lay opinion ‘helpful’ to the trier of fact. As a general proposition, Rule 701 liberalizes the common law standard.”

DIJO, Inc. v. Hilton Hotels Corp., 351 F.3d 679 (5th Cir. 2003)

“Federal Rule of Evidence 701 was amended in 2000 to prohibit lay witnesses from offering opinions based on ‘scientific technical or other specialized knowledge within the scope of Rule 702.’ We have previously recognized that ‘the amendment did not place any restrictions on the preamendment practice of allowing business *owners or officers* to testify based on *particularized knowledge* derived from their position.’ Nevertheless, it has always been the rule that lay opinion testimony may be elicited only if it is based on the witness's first-hand knowledge or observations. This foundational requirement helps to eliminate the risk that a party will circumvent the reliability requirements set forth in Federal Rule of Evidence 702 by adducing expert testimony in lay witnesses' clothing.”

McCormick on Evidence (MCMK-EVID § 11)

“As the accompanying Advisory Committee’s Note explains, there were two reasons for the amendment. One was ‘to eliminate the risk that the reliability requirements of Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.’ The other reason was to prevent litigants from evading the mandatory discovery requirements for expert testimony, set out in Federal Rule of Civil Procedure 26 and Criminal Rule 16.”

Expert versus Lay Opinion Testimony

- What are the differences between expert and lay testimony?

Rule 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert's **scientific, technical, or other specialized knowledge** will **help the trier of fact** to understand the evidence or to determine a fact in issue;
- (b) the testimony is **based on sufficient facts or data**;
- (c) the testimony is the **product of reliable principles and methods**; and
- (d) the expert's **opinion reflects a reliable application of the principles and methods to the facts of the case**.

McCormick on Evidence (MCMK-EVID § 11)

“In general terms, the judge can draw the line by focusing on the fundamental question of why the opinion is being admitted: Is it being accepted because it is impractical to verbalize the primary data such as the witness’s personal experience (the rationale for lay opinion) or because the witness has a methodology (a technique or theory) for drawing a more reliable inference from the primary data (the rationale for expert opinion)? The Note accompanying the 2000 amendment suggests that the trial judge follow that approach.”

Defining Expert Testimony

- Governed by Federal Rule of Evidence 702
- Experts must have specialized knowledge, skill, experience, or training
- Opinions must be based on sufficient facts and reliable methods

Admissibility Standards for Expert Testimony

- *Frye* Standard: General acceptance test (pre-*Daubert*)
- And then in *Daubert v. Merrell Dow Pharmaceuticals*:

Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “ ‘general acceptance,’ ” the assertion that the Rules somehow assimilated *Frye* is unconvincing. ***Frye* made “general acceptance” the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.**

Admissibility Standards for Expert Testimony

- *Daubert v. Merrell Dow Pharmaceuticals*: Established criteria for admissibility
 - Relevance and reliability of methods
- “ . . . under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”
- Federal Rule 702 codifies admissibility requirements

Case Law Supporting Expert Testimony

- *Kumho Tire v. Carmichael*: Applied Daubert to technical experts

“We conclude that Daubert’s general holding—setting forth the trial judge’s general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.”

- *General Electric Co. v. Joiner*: Courts can exclude unreliable expert opinions

General Electric Co. v. Joiner:

- “Respondent points to *Daubert*’s language that the ‘focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.’ 509 U.S., at 595, 113 S.Ct., at 2797. He claims that because the District Court’s disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. **But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.** See *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (C.A.6), cert. denied, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992). That is what the District Court did here, and we hold that it did not abuse its discretion in so doing.”

Expert Qualifications

- “...expert is viewed, not in a narrow sense, but as a person qualified by ‘knowledge, skill, experience, training or education.’ Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called ‘skilled’ witnesses, such as bankers or landowners testifying to land values.”

1972 Proposed Rules Advisory Committee Notes

Methods and Reliability

- *Daubert* factors as explained by the United States Bankruptcy Court for the Southern District of Texas:

“In *Daubert*, the Supreme Court set forth **five factors** courts should consider when exercising their gate-keeping function under Federal Rule of Evidence 702 and making their preliminary assessments of whether the reasoning underlying expert testimony is scientifically valid and can properly be applied to the facts in issue. The five factors are: (1) **whether the technique in question has been tested**; (2) **whether the technique has been subject to peer review and publication**; (3) **the error rate of the technique**; (4) **the existence and maintenance of standards controlling the technique's operation**; and (5) **whether the technique has been generally accepted in the scientific community**. ‘[W]hether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.’ The **ultimate inquiry is whether the expert's testimony is sufficiently reliable and relevant to be helpful to the finder of fact**. The answer to that inquiry determines whether the testimony is admissible at trial. *Daubert* applies equally to experts that rely on the application of scientific principles and those that rely on skill- or experience-based observation.”

In re USA Promlite Technology Inc., 2022 WL 5224246 (Bankr. S.D. Tex. 2022)

Expert versus Lay Opinion Testimony

- Key differences:
 - Personal knowledge vs. specialized knowledge
 - Scope of opinions
- Case example: *State v. Brown* – Blurred lines between lay and expert opinions

“The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on “special knowledge.” **In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony ‘results from a process of reasoning familiar in everyday life,’ while expert testimony ‘results from a process of reasoning which can be mastered only by specialists in the field.’** The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.”

Rule 701, 2000 Amendments Advisory Committee Notes

Property Owner Testimony in Bankruptcy Cases

- “Generally, whether a property owner's testimony as to the value of his property, is received under Rule 701 or Rule 702 makes little difference because if the witness is truly an expert and credible, his testimony will be given great weight and if he has very little or no real expertise, the testimony will be given little if any weight. However, whether the witness testifies under Rule 701 or Rule 702 is significant as to the extent of his testimony. If testifying under 701, the owner may merely give his opinion based on his personal familiarity of the property, often based to a great extent on what he paid for the property. On the other hand, if he is truly an expert qualified under the terms of Rule 702 ‘by knowledge, skill, experience, training or education ...,’ then he may also rely on and testify as to facts ‘of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject ...’ pursuant to Rule 703. For example, the average debtor-homeowner who testifies in opposition to a motion for relief from the § 362 automatic stay, should be limited to giving his opinion as to the value of his home, but should not be allowed to testify concerning what others have told him concerning the value of his or comparable properties unless, the debtor truly qualifies as an expert under Rule 702 such as being a real estate broker, etc.”

Bankruptcy Evidence Manual § 701:2

Practical Challenges in Court

- Distinguishing lay opinions from expert testimony
- Cross-examining experts effectively
- Addressing *Daubert* motions and challenges
- Practical advice for attorneys in presenting testimony

Ethical Considerations

- Avoiding conflicts of interest in expert testimony
- Ensuring truthful and unbiased opinions
- Ethical responsibilities of attorneys and experts

Key Takeaways

- Understanding the rules for lay and expert testimony is crucial
- Adherence to statutory and case law ensures admissibility
- Preparation and strategy are key to presenting persuasive testimony
- Staying informed about emerging trends is essential

VALUATION ISSUES IN CONSUMER CASES

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VALUATION ISSUES IN CONSUMER CASES

“Never pay retail!” So we are advised by countless advertisements bombarding us over the airwaves, in pop-up internet ads, and by gorilla-suited sign twirlers. Until the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), this was good advice in bankruptcy as well as life in general. Now the question as to valuation in bankruptcy is often not “What is it really worth?” but “What does Congress tell me I have to pay?” BAPCPA’s addition of the hanging paragraph following 11 U.S.C. §1325(a)(9) prevented valuation of certain motor vehicles. BAPCPA’s addition of 11 U.S.C. §506(a)(2) set a new standard for valuation of most personal property in individual Chapter 7 and 13 cases. And, of course, 11 U.S.C. §1322(b)(2) has prevented bifurcation of home mortgages (on principal residences) at least since the Supreme Court’s decision in *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993).

Valuation is still an important concept in bankruptcy since a debtor is able in many instances to “strip down” some secured claims under 11 U.S.C. §506 and pay only the secured portion of the claim.¹ For most debtors, their two most valuable assets are their home and their car. Since cram-down of their house will generally be prohibited by 11 U.S.C. § 1322(b)(2), the most ubiquitous valuation fights generally center around the debtor's car (or for those of us here in Texas, pickup truck). Valuation issues arise in other contexts besides confirmation, however, as shown herein. This paper will consider some of the practical aspects to consider in valuation disputes regarding collateral.

¹ Bankruptcy practitioners often refer to this as “cram down” as in “I am going to cram down the value on that car.” However, the Supreme Court in *Associates Commercial Corporation v. Rash*, 520 U.S. 953 (1997), and cases following that decision (such as *In re DeSardi*, 340 B.R. 790 (Bankr.S.D.Tex. 2006)) made clear that “cram down” is confirming the plan over the creditor’s objection, even if the debtor is not paying less than the entire allowed secured claim. The Supreme Court uses the term “strip down” for when the debtor reduces a secured claim to the value of the collateral. See, i.e., *Bank of America v. Caulkett*, ___ S.Ct. ___, 135 S.Ct. 1995 (2015) (“In *Dewsnup*, the Court confronted a situation in which a Chapter 7 debtor wanted to “ ‘strip down’ ”—or reduce—a partially underwater lien under § 506(d) to the value of the collateral.”)

The majority of cases with regard to valuation in consumer cases are concerned with motor vehicles, since that is generally the only collateral in most cases over which it makes economic sense to fight. Therefore, this paper is weighted heavily toward motor vehicle cases, but the analysis should be substantially the same with regard to other collateral.² There are, of course, those consumer cases involving valuation of things such as businesses or other intangible interests. As those will invariably require extensive expert testimony, those issues are beyond the scope of this paper.

THE PURPOSE OF VALUATION

While the most common area in which valuation is contested is with respect to confirmation of Chapter 13 Plans or Motions for Valuation³, the issue of the value of particular collateral can arise in a number of aspects of a Chapter 7, Chapter 13, or individual Chapter 11. The debtor, of course, must include values for real and personal property throughout the Schedules. Official form B10, the Proof of Claim form, now includes a blank for the creditor to include “Value of Property” in part 4 of the Proof of Claim. Motions for Redemption under 11 U.S.C. §722 require the debtor to pay the amount of the “allowed secured claim... at the time of redemption.”⁴ Motions for Relief from Stay often involve valuation of collateral to determine lack of equity. And while the Supreme Court in *Bank of America, N.A. v. Caulkett*, ____ U.S. ____, 135 S.Ct. 1995 (2015) prohibited stripping off

² Additionally, Wilcox Law represents mostly vehicle finance companies, so Mr. Wilcox can perhaps be forgiven for having a bias toward vehicle valuation.

³ All of the form plans for the four districts in Texas either include an express Motion for Valuation (Northern District, Southern District and Western District except San Antonio) or language which acts as a Motion for Valuation (Eastern District, Western District - San Antonio).

⁴ See the section on §722 redemption, below.

junior mortgageholder's liens in Chapter 7, they left open the possibility in Chapter 13 proceedings.⁵ Section 506(a)(1) makes clear that valuation is a fluid concept which depends on the context and the purpose of the valuation. "Such value shall be determined in the light of the purpose of the valuation and of the proposed disposition or use of the property, and in conjunction with any hearing on such disposition or use or on a plan affecting the creditor's interest." 11 U.S.C. §506(a)(1). Thus, "[a] valuation made for one purpose is not res judicata as to a later valuation in the same case for a different purpose." *In re Richardson*, 97 B.R. 161, 162 (Bankr.W.D.N.Y. 1989).

This paper is primarily concerned with 11 U.S.C. §506 valuation in the context of confirmation or redemption, although many of the issues raised herein will likewise apply with regard to these other valuation contexts.

VALUATION FOR VALUATION'S SAKE

With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), a whole class of motor vehicles (and other property) were taken out of the purview of 11 U.S.C. §506, and thus of valuation with regard to Chapter 13 confirmation issues, through the action of the infamous "hanging paragraph" following 11 U.S.C. §1325(a)(9).⁶ Yet the form plan in the Northern District of Texas specifically includes a Motion for Valuation for "Secured 1325(a)(9) Claims Paid by the Trustee - No Cram Down."⁷ The Western District of Texas plan forms for Austin, Midland and San Antonio do not include specific provisions for claims covered by the

⁵ See, *In re Wilson*, 2015 WL 3561476 (D.C.S.D.N.Y. 2015) ("...*Caulkett* only applies in the Chapter 7 context."

⁶ This is actually one of two "hanging paragraphs" enacted by BAPCPA. There is also a "hanging paragraph" following 11 U.S.C. §521(a)(7) which is of particular interest to Chapter 7 practitioners with regard to reaffirmation agreements.

⁷ While the "hanging paragraph" technically follows 1325(a)(9) and is not part of 1325(a)(9), it is clear that this reference is to the hanging paragraph.

“hanging paragraph”⁸ and therefore by their language seek to value such collateral.⁹

Since the “hanging paragraph” precludes use of 11 U.S.C. §506 to value collateral, any valuation of collateral covered by the “hanging paragraph” should be disallowed. *See, i.e., In re Bufford*, 343 B.R. 827, 831 (Bankr.N.D.Tex. 2006) and *In re DeSardi*, 340 B.R. 790, 813 (Bankr.S.D.Tex. 2006). Any valuation of collateral covered by the “hanging paragraph” in the context of confirmation would be an advisory opinion only and the court is constitutionally prohibited from issuing advisory opinions as to value:

The single question before the court is this. May a debtor obtain a valuation of property for the sake of valuation alone? The debtor acknowledges there is no equity in the property, so valuation is not required for that purpose.⁷ Clearly, no reorganization purpose for the valuation was contemplated, because the debtor's only source of income with which to fund a plan is the very property which is voluntarily going back to the lender. The debtor gave no indication of any other purpose for the valuation, other than to set the deficiency claim for the benefit of the guarantor partners.

At least two courts presented with this issue have concluded that in these circumstances valuation is not appropriate. *In re Richardson*, 97 B.R. 161, 162 (Bankr.W.D.N.Y.1989); *accord, In re Turnbow*, 121 B.R. 11, 13 (Bankr.S.D.Tex.1990). These courts observe that a Section 506(a) valuation requires some context in order for the procedure to be invoked, and that the lack of such a bankruptcy related context would deprive the bankruptcy court of the jurisdiction to even make what would be essentially an advisory decision. *In re Turnbow*, 121 B.R. at 13, citing *In re Richardson*, *supra* and *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971).

In re Mesa Business Partnership, 127 B.R. 144, 147 (Bankr.W.D.Tex. 1991).

The same analysis would apply with regard to any argument that the valuation listed with

⁸ Generally called “910” claims since motor vehicles are the majority of collateral covered by the “hanging paragraph,” but recall that the “hanging paragraph” likewise covers any “thing of value” purchased within one year of the filing of the case.

⁹ The form plans for the Eastern and Southern Districts of Texas have special paragraphs for “hanging paragraph” claims, and the forms for El Paso and Waco in the Western District of Texas have a separate Motion for Valuation, as opposed to automatically seeking to value all personal property claims being paid through the Chapter 13 Plan.

regard to “direct pay” claims in the Northern and Southern District plans¹⁰ or other Motions for Valuation of Collateral when there is not a specific and immediate purpose for the valuation. As the court in *In re Richardson* said:

Aside from the absence of jurisdiction to conduct a valuation in this matter, considerations of ripeness and judicial economy require that the debtors' motion be denied. A valuation made for one purpose is not res judicata as to a later valuation in the same case for a different purpose. *In re Ahlers*, 794 F.2d 388 (8th Cir.1986), rev'd on other grounds, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). The Senate Committee Report discussing § 506(a) states that:

While courts will have to determine value on a case-by-case basis, the subsection [506(a)] makes it clear that valuation is to be determined in light of the purpose of the valuation and the proposed disposition or use of the subject property. This determination shall be made in conjunction with any hearing on such disposition or use of property or on a plan affecting the creditor's interest. To illustrate, a valuation early in the case in a proceeding under sections 361–363 would not be binding upon the debtor or creditor at the time of confirmation of the plan.

S.Rep. No. 95–989, 95th Cong., 2d Sess. 68 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5854 (emphasis added).

An entry in the Congressional Record expands on this: “Additionally a determination of what portion of an allowed claim is secured and what portion is unsecured is binding only for the purpose for which the determination is made. Thus determinations for purposes of adequate protection is [sic] not binding for purposes of ‘cram down’ on confirmation in a case under chapter 11.” 124 Cong.Rec. H11095, H11111–12 (Sept. 28, 1978) (emphasis added).

Other courts have recognized the futility of performing valuations where no purpose is served and a subsequent valuation is likely to supersede the current one. *In re Grain Services, Inc.*, 47 B.R. 35, 37 (N.D.Miss.1984) (valuation of corporate assets would be premature where secured creditor did not consent to their sale); *In re Palombo Farms of Colorado, Inc.*, 43 B.R. 709, 711 (D.Colo.1984) (where the stated purpose of valuation, surrender, is not supported by an offer of surrender in the pleadings, valuation would be futile).

In re Richardson, 97 B.R. 161, 162 (Bankr.W.D.N.Y. 1989).

¹⁰ Note that these plans do not include the direct pay collateral in the Motion for Valuation, so there should not be any argument that these values are binding, but some take an overly-expansive reading of *United Student Aid Funds, Inc. v. Espinoza*, 559 U.S. 260 (2009) to say that anything in the plan to which the creditors do not object is binding.

VALUATION UNDER 11 U.S.C. §506

Generally, valuation of the secured creditor's collateral will start with 11 U.S.C. §506. "The value of the allowed secured claim is governed by § 506(a) of the Code." *Associates Commercial Corp. V. Rash*, 520 U.S. 953, 957, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). Section 506 provides, in relevant part:

Section 506 Determination of Secured Status

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

Section 506 uses a curious turn of phrase: "the value of such creditor's interest in the estate's interest in such property." The term "the value of such creditor's interest," however, means simply the value of the collateral that secures the creditors lien." *United Sav. Ass'n of Texas v. Timbers of Inwood Forrest Associates, Ltd.*, 484 U.S. 365, 372, 108 S.Ct. 626, 631, 98 L.Ed. 2d 740 (1988). We will discuss the meaning of "the estate's interest in such property" below in the section on non-filing co-debtors. Practically, however, 11 U.S.C. §506(a)(1) allows the debtor to bifurcate a secured creditor's claim into an allowed secured claim and an allowed unsecured claim. The provisions of 11 U.S.C. §1325(a)(5) only apply to the allowed secured portion of the claim, not the

allowed unsecured portion of the claim. “[U]nder the cram down option, [the debtor may] keep the collateral over the creditor’s objection and provide the creditor, over the life of the plan, with the equivalent of the present value of the collateral. *Associated Commercial Corp. v. Rash*, 520 U.S. at 962. See also, *In re Trimble*, 50 F. 3d 530, 530-531 (8th Cir. 1995)(“The amount of a secured claim under 11 U.S.C. §1325(a)(5)(B) is determined by 11 U.S.C. §506(a).”)

RAISING THE §506 VALUATION

Valuation under §506 is raised by motion, as set forth in Bankruptcy Rule 3012. Rule 3012 provides:

The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

Bankruptcy Rule 3012.

At first blush, this rule would seem to require that a separate motion for valuation be filed. See, however, *In re Hoskins*, 262 B.R. 693 (Bankr.E.D.Mich. 2001). In *Hoskins*, the court held that “[i]f only implicitly, then, it is fair to say that the very act of filing a plan constitutes a request that the Court enter an order confirming it, and so the chapter 13 plan itself *is* a motion.” *Id.* at 697 (emphasis in original). The court went on to examine Bankruptcy Rule 9014 with regard to initiating and litigating contested matters and held that a chapter 13 plan meets the requirements of Rule 9014. *Id.* at 697-698. The court did note, however, that if a Motion for Valuation under §506 is included in the plan, it must meet the requirements of Rule 9013 which requires that a “motion shall state with particularity the grounds [for the order requested] ... and shall set forth the relief or order sought.” *Id.* at 698. So if the chapter 13 plan itself seeks to value the collateral, it must allege that the plan seeks to value the collateral with particularity.

Simply including a value in the chapter 13 plan may not be enough to raise the issue of

valuation under §506 and Rule 3012. The Eleventh Circuit in *In re Calvert*, 907 F.2d 1069 (11th Cir. 1990), said that “mere notice that the bankruptcy court will hold a confirmation hearing on a proposed bankruptcy plan, without inclusion of notice specifically directed at the security valuation process, does not satisfy the requirements of Rule 3012.” 907 F.2d at 1072. See also, *In re Linkous*, 990 F.2d 160, 163 (4th Cir. 1992)(“A debtor should inform the secured creditor of an intent to reclassify its claim into partially secured and partially unsecured status. Placing such a responsibility with the debtor is both logical and not unduly burdensome.”) See also, *Wright v. Commercial Credit Corp.*, 178 B.R. 703, 705 (E.D.Va. 1995), appeal dismissed, 77 F.3d 472 (4th Cir. 1996)(“When a party asks the bankruptcy court to determine the extent of a lien or the value of the collateral forming the basis of the lien, adversary proceedings are required, as contemplated by Bankruptcy Rule 7001(2) and Bankruptcy Rule 3012”).¹¹

The court in *In re Hudson*, 260 B.R. 421 (Bankr.W.D.Mich. 2001), however, found that “[v]aluation of a secured creditor’s collateral by motion practice is permissive, not mandatory.” *Id.* at 432. It went on to say that “once collateral has been valued during the confirmation process and a binding confirmation order entered, a Rule 3012 motion to value the collateral would be superfluous. §1327(a).” *Id.* at 433. The *Hudson* case includes a good analysis of what it calls the three classifications of “primacy of plan confirmation,” “primacy of claim allowance,” and “primacy of confirmation conditioned in compliance with due process.” It falls in the “primacy of plan confirmation” camp and holds that a plan, once confirmed, sets the value of the collateral even if the plan did not explicitly state that “a valuation hearing regarding secured claims would take place at the confirmation hearing.” *Id.* at 427.

¹¹ As to the necessity of an adversary proceeding as set forth in *Wright*, see *In re Gates*, 214 B.R. 467, n.4 (Bankr.D.Md. 1997)(“Where the issue is the value of the collateral, a formal adversary proceeding is not required... Nonetheless, a separate proceeding upon motion or objection to claim is required. Such a separate proceeding may be heard concurrently with the hearing upon confirmation, if the valuation has been noticed for hearing.”)

The debtor as well as the creditor may be bound by the confirmed plan. In *In re Fareed*, 262 B.R. 761 (Bankr.N.D.Ill 2002), the court noted that a Motion for Valuation under §506 was distinctly different than a “Claim Objection” under §502, although, it noted, most debtors and parties-in-interest in its district filed claim objections to value collateral. Claim allowance, the court noted, established the total amount of the creditor’s claim under §502. Collateral valuation establishes the amount of the creditor’s allowed secured claim under §506. The court cited *Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000) for the proposition that “Section 506(a) expressly requires that collateral be valued “in conjunction with any hearing on... a plan affecting [a secured] creditor’s interest. In contrast, there is nothing in the Code that requires claims objections under § 502(b), to be determined at the time of confirmation.” *In re Fardeed*, 262 B.R. at 769. Since the debtor’s plan had provided for the payment of the secured creditor’s proof of claim, and since no motion to value had been filed prior to confirmation, the court held that the debtor’s objection to claim (which was really a motion for valuation) had to be denied. *Id.* at 771.¹²

As noted herein, the plans for all four Districts in Texas include either an explicit Motion for Valuation or language in the plan that indicates that value set forth in the plan will be binding. As to districts outside of Texas, because model plans are common and many of them include language regarding valuation of collateral to be heard at the confirmation hearing, the question is becoming less of an issue.¹³ But to be safe, the debtor would be well-advised to include explicit notice to creditors that value will be set at confirmation and a secured creditor would be well-advised to object to any value set forth in the plan, whether or not the plan specifically states that value is set at confirmation or not. The debtor runs the risk of the confirmation order (or at least valuation)

¹² Other courts disagree. *See, In re Shook*, 278 B.R. 815 (9th Cir. BAP 2002).

¹³ Although even form plans promulgated by the court need to be carefully scrutinized. The authors have discovered at least two form plans that did not contain the lien retention language required by 11 U.S.C. §1325(a)(5)(B)(i)(I).

being set aside. The secured creditor runs the risk that the confirmation order will be *res judicata* as to the value of its collateral. Further, the debtor may have to move to value the secured creditor's collateral at or before the confirmation hearing or be barred from raising the issue later.¹⁴

THE BURDEN OF PROOF ON §506 VALUATIONS

However the issue of valuation under §506 is raised, the question then becomes “who has the burden of proof with regard to valuation?” Is the burden on the debtor or other party in interest (see Rule 3012) who files the plan or motion for valuation? Or is the burden of proof on the secured party to show to what extent its claim is secured and to what extent unsecured?

The court in *In re Henry*, 457 B.R. 402 (Bankr.E.D.Penn. 2011) made a simple statement as to the burden of proof, “The first step in the Debtors' strategy requires the valuation of the Vehicle (the collateral for their debt) under 11 U.S.C. § 506(a). See also Fed. R. Bankr.P. 3012. The debtor bears the burden of proof on the valuation issue under § 506(a). See, e.g., *In re Erb*, 2011 WL 2600647, at *2 (Bankr.M.D.Pa. June 29, 2011); *In re Weichey*, 405 B.R. 158, 164 (Bankr.W.D.Pa.2009); *In re Finnegan*, 358 B.R. 644, 649 (Bankr.M.D.Pa.2006).” *Id.* at 405.

Another court stated, “In a motion under 11 U.S.C. §506(a), the debtor bears the *initial* burden of proof.” *In re Bethoney*, 384 B.R. 24, 31 (Bankr.E.D.Mass. 2008)(emphasis added). Such a simple statement may overstate the case, however. As the court in *In re Southmark Storage Assocs. Ltd. P'ship*, 130 B.R. 9 (Bankr.D.Conn. 1991) stated, “The debtor bears the initial burden of overcoming the presumption that the amount of [the creditor's] secured claim is as stated in its proof of claim, but the ultimate burden of persuasion is upon [the creditor] to demonstrate by a

¹⁴ Some debtors and creditors have been trying to agree to put off the issue until the Trustee's Recommendation Concerning Claims, which is filed and heard after confirmation in some districts. There is a real question as to whether such a practice is permissible in that the issue may be *res judicata* after the confirmation order is entered.

preponderance of the evidence the value of the collateral which secures its claim.” *Id.* at 10. This was stated somewhat differently, but to the same effect, by the court in *In re Gates*, 214 B.R. 467 (Bankr. D. Md. 1997):

The burden of proof with respect to claims filed under 11 U.S.C. § 502 rests initially, and ultimately, with the claimant who “must allege facts sufficient to support their claim.” *In re Weidel*, 208 B.R. 848, 854 (Bankr.M.D.N.C.1997) (citation omitted). Nevertheless, “a properly executed proof of claim is sufficient to shift the burden of producing evidence and to entitle the claimant to a share in the distribution of the bankrupt's estate unless an objector comes forward with evidence contradicting the claim.” *Superior Metal Moulding Company, Inc. v. Shipp*, (*In re Friedman*), 436 F.Supp. 234, 237 (D.Md.1977). Although some courts have held that the degree of evidence which must be shown by the objecting party is only “some evidence” contradicting the proof of claim, other courts have stated “the objector must produce evidence equal in force to the prima facie case ... which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency.” *Weidel*, 208 B.R., at 854. See also *In re Shabazz*, 206 B.R. 116, 120 (Bankr.E.D.Va.1996), *afford sub nom. Shabazz v. United States*, No. Civ.A. 97–185–A, 1997 WL 593863 (E.D.Va. June 9, 1997)...

In this case, the proof of claim alleged that Chase held a claim in the amount of \$8,095.46 on the date of the petition upon the basis of an automotive loan secured in the same amount by a perfected security interest in a motor vehicle described as a 1991 Mazda, Vehicle Identification Number: JM1NA3513M0230448. The proof of claim, having been executed and filed in accordance with the bankruptcy rules, constituted prima facie evidence of the validity and amount of the claim. Bankruptcy Rule 3001(f); *Internal Revenue Service v. Levy*, (*In re Landbank Equity Corp.*), 973 F.2d 265 (4th Cir.1992). Debtor's objection attacked the value of the collateral asserted in the proof of claim. If the objection was supported by evidence demonstrating that the value was less than the amount claimed, the objection would be sufficient to overcome the prima facie validity of the proof of claim on that issue.

Id. at 472.

A rather extended analysis of the burden of proof is contained in *In re Roberts*, 210 B.R. 325 (Bankr.N.D.Iowa 1997). The *Roberts* court started by saying, “Generally, a creditor’s proof of claim constitutes prima facie evidence of the validity and amount of its claim. This presumption of the validity of the proof of claim places the burden of producing evidence to rebut the presumption on the Debtor. However, the ultimate risk of nonpersuasion as to the allowability of the claim rests with the creditor.” *Id.* at 328 (citations omitted). After setting forth the general rule, the court in

Roberts then analyzed various court's holding with regard to the burden of proof. It noted that in *In re Mendenhall*, 54 B.R. 44, 45 (Bankr.W.D.Ark. 1985) where the parties submitted written appraisals that were of very little value, the burden of proof would be determinative on the issue of valuation. It held that the objecting creditor had the burden of persuasion as to the issue. *Id.* *Roberts* then notes that other courts have held that §1325 places the burden on the debtor to prove that the requirements for confirming a chapter 13 plan have been met.¹⁵ (Citing *Tillman v. Lombard*, 156 B.R. 156, 158 (E.D.Va. 1993) and *In re Weissner*, 190 B.R. 453, 454 (Bankr.M.D.Fla. 1995). The court in *Mendenhall*, it notes, held that, "if §1325 places any burden on the debtor it is to rebut any evidence introduced to support an objection to confirmation. The burden of production may then shift from opponent to opponent, but the burden of persuasion remains with the objecting creditor." *Id.*

After analyzing the various cases, the *Roberts* court holds:

The Court concludes that the presumption of the prima facie validity of the Bank's claim in Rule 3001(f) applies to this valuation hearing arising in the context of Chapter 13 plan confirmation. Debtor has the burden of coming forward with sufficient evidence to rebut that presumption. If Debtor presents sufficient evidence to rebut this presumption, the burden then transfers to the creditor to assume the ultimate burden of persuasion on the issue of the value of the collateral securing its claim.

In re Roberts, 210 B.R. at 328.

The court in *In re Hudson*, 260 B.R. 421 (Bankr.W.D.Mich. 2001) would apparently disagree. It stated, after noting that the *prima facie* effect of a proof of claim establishes only whether a creditor has a valid, enforceable and perfected security interest and the amount of the total claim, "...the claims allowance process does not determine the amount of the secured portion of a

¹⁵ This raises an interesting question in light of the previous section. If the debtor bears the burden of proof on confirmation, and valuation is raised as part of the chapter 13 plan and thus as part of the confirmation process, does this mean that the debtor has thereby assumed the burden of proof on valuation, no matter the burden under §506?

claim under §506(a).” *Id.* at 436 (italics in original). Based on *Hudson* it could be argued, therefore, that the initial burden is on the creditor to show the value of the collateral. That is not explicitly stated in the opinion, however.

The court in *In re Brown*, 244 B.R. 603 (Bankr.W.D.Va. 2000) made a rather detailed examination of the burden of proof with regard to a Chapter 13 plan which attempts to cram down the value of a secured creditor’s claim and reached a contrary result, placing the burden squarely on the debtor. “A threshold and in this case critical question is whether the Debtor or the creditor has the burden of proof on the issue of collateral valuation in a Chapter 13 Plan which seeks to “cram down” a collateral value which is less than the amount of the creditor’s claim.” *Id.* at 607. The court noted the difficulty in answering the burden of proof question.

The difficulty of answering the question posed, i.e., whether the creditor or the debtor has the burden of proof on the issue of collateral valuation in a Chapter 13 “cram down” case, is that it lies at the intersection (or perhaps collision) of three often noted general principles, namely:

1. The debtor as the plan proponent [sic] has the burden of proof as to compliance with Chapter 13 requirements. *In re Stewart*, supra;
2. A party objecting to plan confirmation bears the burden of proof as to its objection. *In re Segura*, supra, and other cases cited above; and
3. Although a properly executed and filed proof of claim is prima facie evidence of the validity and amount of the claim (Bankruptcy Rule 3001(f)), once the objecting party submits sufficient evidence to place the claimant’s entitlement in issue, the ultimate burden of proof or persuasion is upon the creditor to establish its claim. See *Russell, Bankruptcy Evidence Manual* § 301.50 at page 419 (West 2000 edition); *In re Harrison*, 987 F.2d 677 (10th Cir.1993); *In re Tidewater Memorial Hospital, Inc.*, 106 B.R. 885 (Bankr.E.D.Va.1989).

Id. at 608. After addressing the question, the court noted that neither the Bankruptcy Code nor the Bankruptcy Rules specify which party has the burden of proof. *Id.* The court examined the conundrum addressed herein and found that it would be wrong to state that the debtor had the burden

of proof with regard to confirming a Chapter 13 plan, but then shift the burden to the creditor simply because it filed an objection to confirmation. As the court said, “because the creditor's rights are being reduced or eliminated, it seems appropriate that the burden of proof in such a situation should be placed upon the party benefitting from the process, i.e., the debtor.” *Id.* at 610-611.

A number of courts as set forth above, however, have addressed the burden of proof by holding that the burden of proof is on the debtor to offer some evidence to rebut the *prima facie* validity of the creditor’s allowed claim. A claim is not allowed until it is filed. But since BAPCPA mandates an early confirmation hearing, prior to the proof of claim deadline in most cases, what effect does this have on the burden of proof? If the creditor has not yet filed a proof of claim, does the debtor not have the initial burden? Should the creditor file an early proof of claim and thus shift the burden of proof?

Indeed, one court has held that a proof of claim must be filed before a court can value the claim at all pursuant to 11 U.S.C. §506(a). See, *In re Clark*, 205 B.R. 140 (Bankr.S.D.Ill. 1997):

The clear implication of § 506(a)'s reference to “allowed” claims is that a creditor's claim must be filed and allowed before a court can value the claim pursuant to § 506(a). See *King*, 165 B.R. 296, 299 (Bankr.M.D.Fla.1994). Section 506(a) speaks in terms of valuing a “claim” rather than the collateral underlying such a claim. *Id.*; see also Fed.R.Bankr.P. 3012 (providing for valuation of a “claim” secured by a lien on motion of a party in interest). Since it would be illogical to value something that does not yet exist, the language of § 506(a) indicates that filing a proof of claim is a prerequisite to a court's determination of the value of a secured claim. *King*, at 298–99.

Id. at 142. If the court in *Clark* is correct, then even if the plan includes a “motion for valuation”, such motion would not be ripe for determination until a proof of claim is filed.

This issue was also addressed by the court in *In re Busman*, 5 B.R. 332 (Bankr.E.D.N.Y. 1980). *Busman* held that “if a secured creditor seeks to object to confirmation of a Chapter 13 plan on the basis that the plan does not comply with the provisions of 11 U.S.C. §1325(a)(5)(B)(ii), he must first file a proof of claim and then it becomes incumbent upon the court to determine the

secured status of the objecting creditor pursuant to the provisions of 11 U.S.C. §506(a). See: H.R.Rep. 95-595 at 356.” *Id.* at 339-340. The *Busman* court went on to say that: “If the secured creditor does not file a proof of claim, the Court has no subject matter basis for determining the secured status of the objecting creditor. Should the secured creditor fail to file a proof of claim prior to the confirmation of the plan, then, and in that event, the provisions of the plan become absolute and binding upon the secured creditor, whether or not such creditor has objected to, has accepted, or has refused the plan. 11 U.S.C. § 1327; H.R.Rep. 95-595 at 430.” *Id.* The Court goes on to say, “Concomitantly, should the debtor list a secured creditor's claim at a “cram down” value, objection to such value by the secured creditor is subject to initial demonstration that he has in fact an allowed secured claim. This can only be accomplished by the filing of a proof of claim. 11 U.S.C. § 502(a). Upon the creditor filing its claim, the burden shifts to the debtor or trustee or any party in interest to object to the value of the claim listed in the proof of claim to offset the prima facie connotation of the claim's validity and amount.” *Id.* Although *Busman* was based on Bankruptcy Rule 13-302(e)(1) which was replaced by Bankruptcy Rule 3002 (*See, Matter of Mikrut*, 79 B.R. 404, 407 (Bankr.W.D.Wis. 1987)), it is still cited for the proposition that a claim must be allowed before it can be valued. *See, In re Simmons*, 237 B.R. 672, 676 (Bankr.N.D.Ill. 1999).

Perhaps by adding 11 U.S.C. §1324(b) which mandates a confirmation hearing “not earlier than 20 days and not later than 45 days after the date of the meeting of creditors...,” which date is clearly prior to the deadline for filing proofs of claim, Congress implicitly overruled *Clark* and *Busman*. However, since there is no requirement for a secured creditor to file a proof of claim¹⁶, this argument fails.

¹⁶ See Bankruptcy Rule 3002(a). See also, *In re Macias*, 195 B.R. 659 (Bankr.W.D.Tex. 1996)(“The creditor notes correctly that the bankruptcy rules do not impose a bar date for secured claims in a chapter 13 case. Fed.R.Bankr.P., Rule 3002 (Clark, Boardman, Callaghan 1995–96 ed.). A secured creditor may choose not to file a claim at all, pursuant to Section 501 of title 11, and it is that provision perhaps that best explains why secured creditors were excluded from Rule 3002. See 11 U.S.C. § 501.”)

There appears to be no clear answer regarding this issue. The best practice appears to be for a secured creditor to file a proof of claim before the confirmation hearing and thus have a *prima facie* claim. Most courts would hold that this shifts the burden to the debtor to at least present some evidence with regard to value. This is clearly less risky than relying on the argument that its claim cannot be valued at confirmation because it was not filed.¹⁷

METHODS OF VALUATION

How is the Court to determine value? The courts have made it clear that valuation is a question of fact for the bankruptcy judge and that no ‘formulaic’ approach is proper. “The legislative history of § 506(a) indicates that valuation should be done ad hoc and that no fixed approach is correct.” *In re Balbus*, 933 F.2d 246, 249 (4th Cir. 1991). “Valuation is a question of fact, and can be overturned on appeal only if clearly erroneous.” *Matter of Vitreous Steel Products Co.*, 911 F.2d 1223, 1232 (7th Cir. 1990). “‘Value’ is not a narrow term which can be rigidly applied under the same standard in all cases for all purposes; rather, the courts are called upon to determine ‘value’ on a case-by-case basis, in the process considering the purpose of valuation and the proposed disposition or use of the subject property.” *In re Zersen*, 189 B.R. 732, 738 (Bankr.W.D.Wis. 1995). “The Bankruptcy Code offers no bright line standards to follow when valuing collateral for purposes of section 506(a). Value must therefore be determined on a case by case basis, guided by equitable principles.” *In re Costello*, 184 B.R. 166, 171 (Bankr.M.D.Fla. 1995). “The valuation of assets is not an exact science, and is done on a case-by-case basis.” *In re Gonch*, 435 B.R. 857, 864 (Bankr.N.D.N.Y. 2010).

¹⁷ Note, however, that courts do hold that the secured creditor has the burden of proof to show that it is oversecured and thus entitled to post-petition fees and costs. See, *In re McCoy*, 163 B.R. 206 (Bankr.M.D.Fla. 1994); *In re Grabill Corp.*, 121 B.R. 983 (Bankr.N.D.Ill. 1990).

Section 506(a) of the Bankruptcy Code provides only general principles we should follow in determining what standard of valuation is proper in calculating the value of a creditor's secured claim: "... Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a). The legislative comments to this section do not give any further guidance except to reiterate that we are to determine value on a case-by-case basis, taking into account the facts of each case and the competing interests in the case. H.R.Rep. No. 545, 95th Cong., 1st Sess. 356 (1977) reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 6312.

Matter of Lackow Bros., Inc. 752 F.2d 1529, 1532 (11th Cir. 1985).

The Supreme Court in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997) stepped into the morass of valuation disputes. In *Rash*, the Supreme Court said that "In such a cram down case, we hold, the value of the property (and thus the amount of the secured claim under § 506(a)) is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Id.* at 960. In other words, the Supreme Court said, valuation under §506 for purposes of a Chapter 13 plan is replacement value. However, after holding that replacement value was the proper standard, the *Rash* opinion included the infamous footnote 6, which stated:

Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that replacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning. Cf. 90 F.3d, at 1051-1052. Nor should the creditor gain from modifications to the property-e.g., the addition of accessories to a vehicle-to which a creditor's lien would not extend under state law.

Id. at fn 6.

Footnote six allowed the courts to interpret *Rash* in a variety of ways, often going right back

to the valuation schemes that they were using before the *Rash* decision. See, for instance, *In re Gluek*, 223 B.R. 514 (Bankr.S.D.Ohio 1998). The Court in *Gluek* held that the Supreme Court, in *Rash*, provided no starting point for replacement value. Prior to *Rash*, the court used the mid-point between the wholesale and retail values from a “nationally recognized car valuation guide.” *Id.* at 516. Although the Supreme Court specifically rejected a ‘mid-point’, ‘split book’, or ‘split the difference’ approach, the Court in *Gluek*, following a number of other courts, felt comfortable in going back to this as a “starting point” for valuation. “This Court is not setting the average of retail and wholesale as the per se value for purposes of cram down under § 1325(a)(5)(B), but is merely establishing that as a starting point for the analysis. The Court will consider any additional evidence presented by the parties probative of the value of the relevant automobile.” *Id.* at 519-520.

Indeed, as the Supreme Court recognized in *Rash*, there is an “attractiveness” to a split-the-difference” approach. As the Supreme Court in *Rash* went on to say, “We agree with the Seventh Circuit that a “simple rule of valuation is needed” to serve the interests of predictability and uniformity.” *Rash*, 520 U.S. at 964. The Court in *Gluek* made this case even more strongly: “The Court finds that it would be prohibitively costly to require expert testimony for determination of value of every automobile in Chapter 13 proceedings.” *Gluek*, 223 B.R. at 519.

Indeed, Chapter 13 is a fast-moving, high-volume practice that lends itself to such “shortcuts” as the mid-book approach. Other courts adopted other presumptive standards:

To assist in that determination [of replacement value under *Rash*], bankruptcy courts have developed various presumptive standards for making a replacement valuation determination because the majority of cramdown cases that come before the courts are filed by individual consumers who wish to retain and pay for their personal automobiles. Values in the automotive market are generally well defined by industry standards. For example, some courts set the presumptive replacement value of automobiles at 90% of the N.A.D.A. retail listing, *In re Capel*, No. 05–50213, 2005 WL 1287991 at *9 n. 9, 2005 Bankr.LEXIS 1094 at *28 n. 9 (Bankr.M.D.N.C.2005), the midpoint between the N.A.D.A. retail and the Kelley Blue Book private party value, *In re Gray*, 285 B.R. 379, 384 (Bankr.N.D.Tex.2002), the N.A.D.A. retail value, *In re Russell*, 211 B.R. 12, 14 (Bankr.E.D.N.C.1997), or the midpoint between

the N.A.D.A. retail and trade-in values, *In re Henry*, 328 B.R. 529, 536 (Bankr.S.D.Ohio 2004).

In re Nice, 355 B.R. 554, 556 (Bankr.N.D.Va. 2006).

Then came BAPCPA and completely changed the playing field. Or did it?

RETAIL VALUE VERSUS REPLACEMENT VALUE

Following *Rash*, some creditors argued that “replacement value” was retail value. After all, that is the best measure of what a willing buyer (in the vast majority of Chapter 13 cases, an individual) would pay a willing seller. This argument was undercut somewhat, as noted above, by footnote 6 of the *Rash* decision. Many courts expressly held that whatever replacement value was, it was not retail value. *See, i.e. In re Lyles*, 226 B.R. 854 (Bankr.W.D.Tenn. 1998). The debate was supposedly ended, in the vast majority of cases, by the amendments to §506 enacted by BAPCPA.

BAPCPA added 11 U.S.C. §506(a)(2) to section 506. That addition provides:

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

This provision will apply in the vast majority of Chapter 13 cases, at least for those vehicles which are not covered by the “hanging paragraph.” Note that by its wording, this statute seems to recognize the result reached in a number of the post-*Rash* cases: replacement value is not ordinarily equivalent to retail value. If it was, the second sentence of the paragraph would be superfluous. Therefore, in valuing motor vehicles in Chapter 13 cases, we have to consider two different values:

replacement value and retail value.¹⁸

As the *Nice* court noted:

Of course, the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 slightly altered some of the Supreme Court's reasoning in *Rash* insofar as the *Rash* opinion relates to personal property held by individual debtors that file under Chapter 7 or 13, and which secures an allowed claim. More specifically, for such debtors that file cases on or after October 17, 2005, new § 506(a)(2) sets the cramdown value of a vehicle at its replacement value, “without deduction for costs of sale or marketing.” 11 U.S.C. § 506(a)(2). Moreover, “[w]ith respect to property acquired for personal, family, or household purposes, replacement value [for the specified categories of debtors] shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.” § 506(a)(2).

In re Nice, 355 B.R. at 557. The *Nice* court went on to note, however, that “Indeed, Congress did not evidence an intent to overrule *Rash* (in fact, Congress codified it), and the focus of the ‘replacement value’ standard remains on what a retail merchant would charge for like-kind property ‘considering the age and condition of the property.’ § 506(a)(2).” *Id.*

The court in *In re Feagans*, 2006 WL 6654576 (Bankr.D.Kan. 2006) agreed that §506(a)(2) is a codification of *Rash*, but said, “However, whereas *Rash* did not definitively state which market would be used as a guide to determine replacement cost, § 506(a)(2) definitively sets replacement cost for a certain class of property as the price a retail merchant would charge for property of that kind considering its age and condition. Thus, under § 506(a), the value of personal property acquired by a Chapter 13 debtor for personal, family, or household purposes is the price a retail merchant would charge, but taking into consideration the age and condition of the property, which, like *Rash*, would exclude value for items not actually received by the debtor such as reconditioning and

¹⁸ While it is true that both are technically “replacement value” in that the second sentence of §506(a)(2) defines replacement value as “what a retail merchant would charge” (hence retail value), it is simpler to think of value as either replacement value (for property that *is not* acquired for personal, family or household use) or retail value (for property that *is* acquired for personal, family or household use). In order to differentiate the two, this paper will use “replacement value” for the former and “retail value” for the latter, asking the reader’s indulgence for the sake of clarity.

warranties.” *Id.* at *3. But see, *In re Cook*, 415 B.R. 529, 534 (Bankr.D.Kan. 2009)(“The first sentence of §506(a)(2) directs that in chapter 7 and 13 cases involving personal property, replacement value is to be determined without regard to the cost of sale or marketing. Because reconditioning prepares the vehicle for sale, it is a cost of sale or marketing that may not be deducted. This departs from the *Rash* standard that allowed reduction of the value of collateral by subtracting the value of items that the debtor did not receive like warranties and reconditioning.”)¹⁹

So, given the amendment to 11 U.S.C. §506, we can just look to the retail value in one of the recognized guides and we’re done, right? Ah, if only it were that simple. The following is an analysis of some of the cases which have interpreted “the price a retail merchant would charge” under §506(a)(2).

In *In re Cook*, 415 B.R. 529 (Bankr.D.Kan. 2009), the court noted that both appraisers before it used the NADA²⁰ website to establish retail and trade-in value of the vehicle. The court noted that “Clean Retail is defined as -

No mechanical defects and passes all necessary inspections with ease; Paint, body and wheels have minor surface scratching with a high gloss finish and shine; Interior reflects minimal soiling and wear, with all equipment in complete working order; Vehicle has a clean title history; Vehicle will need minimal reconditioning to be made ready for resale.

Id. at 535 (footnote omitted). Citing this definition, the court stated that “It strikes the Court that NADA Clean Retail, as so defined, is in most cases the best starting point for valuing personal use vehicles under § 506(a)(2)’s second sentence. While the Court recognizes that some vehicles will be sufficiently unique (low mileage, rare or classic) to require in depth appraisal and evaluation,

¹⁹ What *Cook* giveth, *Cook* taketh away. As noted below, the *Cook* court then stated that “The “age and condition language” [of the second sentence of §506(a)(2)] suggests that the cost of reconditioning may be deducted from the merchant retail value of personal use property in order to account for depreciation and wear.” *In re Cook*, 415 B.R. at 534.

²⁰ The National Automobile Dealers Association (www.nada.com), publisher of the NADA Guides, discussed later herein.

courts valuing most vehicles in chapter 7 and 13 cases could safely begin with this well-accepted and readily available source.” *Id.* (footnote omitted).

Compare *Cook*, with *Midwest Regional Credit Union v. De Anda–Ramirez (In re De Anda–Ramirez)*, 359 B.R. 794 (10th Cir. BAP 2007). In that case, the 10th Circuit BAP stated that, “It is common practice among bankruptcy courts to use the KBB or National Automobile Dealers Association (“N.A.D.A.”) values as a starting point in vehicle valuation.” *Id.* at 798. The BAP then went on to examine the debtor’s reliance on the Kelly Blue Book (KBB) private party value versus the creditor’s reliance on KBB’s retail value. The BAP relied on the definition of KBB “Suggested Retail Value” and noted that it indicated that the value “assumes the vehicle has received the cosmetic and/or mechanical reconditioning needed to qualify it as “Excellent.”“ Since, the BAP noted, “the Bankruptcy Code’s definition of “retail” includes an adjustment for the age and condition of the vehicle”, the KBB retail value was not appropriate in that case. The BAP did note, however, in footnote 3, “The Court is not making a determination of the proper valuation procedure under revised Bankruptcy Code § 506(a)(2). It is clear that the KBB retail value was not appropriate in this case but that does not mean that it is never appropriate.” *Id.* at fn 3. The BAP approved the bankruptcy’s court’s use of the KBB Private Party value.²¹

The Ninth Circuit BAP cited *De Anda–Ramirez*, saying that *De Anda–Ramirez* “not[ed] that Kelly Blue Book is not determinative of retail replacement value but holding that the court’s reliance on Kelly Blue Book for the replacement value was not clearly erroneous.” *In re Labostrie*, 2012 WL 6554727 (9th Cir. BAP 2012). Interestingly, the 9th Circuit BAP did not discuss the 10th Circuit

²¹ The holding is based, in large part, on the court’s finding that the creditor “failed to produce any evidence in support of its objection.” This is interesting for two reasons. First, the creditor apparently did produce the KBB retail value, which the court summarily rejected. Whether the court found that the KBB retail was appropriate or not, it was at least “some evidence” as noted hereinbelow. Second, the court apparently relied on the debtor’s statement in the plan as “evidence” of value. The record in the decision is muddled, but the implications from a evidentiary and burden of proof standard are troubling.

BAP's rejection of Kelly Blue Book retail value. In *Labostrie*, the BAP approved the bankruptcy's court's valuing collateral (for purposes of Chapter 7 redemption, which uses the same standard as Chapter 13 cramdown per §506(a)(2)) by taking the Kelly Blue Book retail value and adjusting it to "account for the age and condition of the Vehicle in reaching its final conclusion concerning the value of the Vehicle." *Id.* at *4. An interesting result considering *De Anda-Ramirez*'s rather curt rejection of KBB retail.

The court in *In re Mayland*, 2006 WL 1476927, (Bankr.M.D.N.C. 2006), noted that the addition of §506(a)(2) under BAPCPA required the court to value collateral acquired for personal family or household use at "what a retail merchant would charge for similar property." *Id.* at *7-8. The court then said that, "The NADA Guide is meant to provide information about the amount for which a retail automobile dealer would sell a given vehicle. Using ninety percent (90%) of the NADA retail value of a vehicle as a starting point for valuing the vehicle is therefore consistent with new *Section 506(a)(2)*, consistent with prior practice in this District, and consistent with the assumptions inherent in the NADA Guide." *Id.* at *8.

The court in *In re Morales*, 387 B.R. 36 (Bankr.C.D.Cal. 2008) stated that, "the Court concludes that, absent unusual circumstances, the retail value for vehicles under §506(a)(2) should be calculated by adjusting either the Kelly Blue Book retail value or the National Automobile Dealers Association ("N.A.D.A.") Guide retail value by a reasonable amount in light of evidence presented regarding condition, the retail market, and other relevant factors." *Id.* at 37. *Accord, In re Scott*, 437 B.R. 168 (Bankr.D.N.J. 2010)("...the Court will use the NADA retail value as the appropriate starting point for calculating the value of the Vehicle under the second sentence of § 506(a)(2).") and *In re Zambuto*, 437 B.R. 175 (Bankr.D.N.J. 2010)(rejecting a wholesale guide in favor of an NADA retail value adjusted for necessary repairs to the vehicle). *See also, In re Araujo*, 464 B.R. 15 (Bankr.N.D.Cal. 2011)(rejecting an Edmunds.com website valuation in favor of

averaging Kelly Blue Book and NADA retail values.)

Most of the courts to review the issue have recognized that, rather than ending the quandary over the proper valuation standard, the BAPCPA amendments to §506(a)(2) have merely continued the disparate approaches and standards to valuation.

A survey of case law reveals various approaches to valuing vehicles under § 506(a)(2). See, e.g., *In re Cook*, 415 B.R. 529, 535 (Bankr.D.Kan.2009) (“NADA Clean Retail ... is in most cases the best starting point for valuing personal use vehicles under § 506(a)(2)”); *In re Mayland*, Ch. 7 Case No. 06–10283, 2006 WL 1476927, at *3 (Bankr.M.D.N.C. May 26, 2006) (calculating retail value of car as 90 percent of NADA retail value, less cost of necessary repairs); *In re Ortiz*, Ch. 7 Case No. 06–16243, 2007 WL 1176019, at *3 (Bankr.S.D.Fla. Feb.27, 2007) (calculating value of car by deducting from the retail value the hypothetical cost of repairs required to bring the car up to retail standards); *In re Martinez*, 409 B.R. 35, 40 (Bankr.S.D.N.Y.2009) (quoting *Rash*, 520 U.S. at 960, 117 S.Ct. 1879) (“The Kelley Blue Book Private Party Value is what a buyer can expect to pay when buying a used car from a private party, a good match with the replacement-value standard promulgated by the *Rash* Court: the ‘price a willing buyer in the debtor’s trade, business or situation would pay to obtain like property from a willing seller.’”). At least three districts have addressed the issue by creating local rules. See, e.g., Bankr. D. Vt. R. 3012–1(b); 7 Bankr. N.D. W. Va. R. 3012–1(a) & App. N; 8 Bankr. E.D. Mo. R. 3015–2(G).

In re Gonch, 435 B.R. at 863-864.

It is important to remember that there are actually two different valuation standards in §506, as set forth above: ‘replacement value’ versus ‘retail value.’ This was recognized by the court in *In re Henry*, 457 B.R. 402 (Bankr.E.D.Penn. 2011). The court in *Henry* said:

Thus, in its present form, as it relates to individual chapter 7 and chapter 13 cases, the plain language of § 506(a)(2) directs the court to ascertain replacement value in two different ways, depending upon whether the secured property was purchased for consumer or non-consumer (presumably business) purposes.

If the secured property was purchased for some non-consumer purpose, replacement value continues to be determined from the perspective of the debtor under the first sentence of § 506(a), as the Supreme Court directed in *Rash* in 1997: “the price a willing buyer in the debtor’s trade, business, or situation would pay to obtain like property from a willing seller.” *Rash*, 520 U.S. at 960, 117 S.Ct. 1879.

On the other hand, if the property was acquired for consumer purposes, the second sentence mandates that replacement value be determined from the perspective of a

retail merchant, not that of the debtor.

Id. at 407. After recognizing these two different valuation standards, the court in *Henry* made a rather detailed analysis of the various valuation methods employed post-BAPCPA. The analysis is good enough to merit quoting in full:

In post-*Rash* cases under § 506(a) involving the determination of the replacement value of motor vehicles, courts have repeatedly grappled with two issues. These issues remain relevant under the first sentence of § 506(a)(2):

(1) how should the court use the commercial reports that are available in the used car industry?; and

(2) should the court use retail value or some other value (such as trade-in, private party or wholesale value) as the starting point in the valuation analysis?

Particularly because cases involving the valuation of motor vehicles frequently are presented to the court without expert valuation testimony, many bankruptcy courts have relied on commercial reports such as the National Automobile Dealers Association Guide (“the NADA Guide”) or the Kelley Blue Book (“the KBB”) as a starting point in the valuation process. Compare *Scott*, 437 B.R. at 173–74 (following *In re Morales*, 387 B.R. 36, 37 (Bankr.C.D.Cal.2008) and using NADA Guide as starting point), with *In re Penny*, 2011 WL 204888, at *2 (Bankr.N.D.Cal. Jan.21, 2011) (employing KBB as starting point), and *In re Martinez*, 409 B.R. 35, 40 (Bankr.S.D.N.Y.2009) (same).

The far more controversial issue is whether the court should begin with the retail, private party, trade-in, or wholesale values listed in the commercial reports being considered.

In some cases, courts have used retail value and adjusted downward. See, e.g., *Scott*, 437 B.R. at 174; *In re Cook*, 415 B.R. 529, 535 (Bankr.D.Kan.2009). In other cases, courts have started with private party value or wholesale value. See, e.g., *Gonch*, 435 B.R. at 865–66. Under both of these approaches, the adjustments have been based on considerations such as the condition of the secured property or other relevant factors.

Some courts have taken an average of the reported retail value and the private party or wholesale value. See *In re Getz*, 242 B.R. 916, 919–20 (6th Cir. BAP 2000); *In re Nice*, 355 B.R. 554, 556 (Bankr.N.D.W.Va.2006); *In re Richards*, 243 B.R. 15, 19 (Bankr.N.D.Ohio 1999); see also L.B.R. 3012–1(b) (Bankr. D. Vt.); *King*, 2003 WL 22110779, at *5 n. 18 (collecting cases).

Other courts have modified the retail value stated in the chosen commercial report by some fixed percentage and used that value as the starting point in the valuation

process. See *Penny*, 2011 WL 204888, at *3; *In re Cheatham*, 2007 WL 2428046, at *3 (Bankr.W.D.Mo. June 19, 2007); *In re Renzelman*, 227 B.R. 740, 741–42 (Bankr.W.D.Mo.1998); *In re Mayland*, 2006 WL 1476927, at *1 (Bankr.M.D.N.C. May 26, 2006); see also Local Rule 3015–2(g) (Bankr. E.D. Mo.) (incorporating court's Procedures Manual, which provides that, absent evidence to the contrary, vehicles will be valued under § 506(a) at 97% of the NADA retail value at the time of filing the petition).

In re Henry, 457 B.R. at 408-409 (footnotes omitted).

After this analysis, the court in *Henry* recognized that “replacement value under *Rash* (and, following BAPCPA, under the first sentence of § 506(a)(2)) is something less than the retail value.” *Id.* at 410. The *Henry* court then set the ‘replacement value’ (as opposed to the retail value) as 30% of the difference between retail and wholesale (“in this particular case, I determine that the Manheim estimated retail price should be reduced by 70% of the difference between the estimated retail price and the wholesale price (i.e., by 70% of the \$3,650.00 “swing”).” *Id.* at 412.

So what is the proper valuation? As noted above, the BAPCPA amendments to §506(a) clearly set forth a difference between replacement value and retail value. However, unlike the *Henry* court cited above, many courts seems to glide over this difference and arrive at ‘retail values’ that are remarkably similar to the results they were reaching under *Rash* and before the amendments under BAPCPA. The “price a retail merchant would charge” would certainly seem to point more to the NADA or KBB retail value, rather than to the KBB private party value. The private party value would arguably be more appropriate for replacement value rather than retail value. The Supreme Court in *Rash* made clear that averaging wholesale and retail values was not appropriate. The more proper value, therefore, would seem to use the KBB or NADA retail as the starting point for retail value, and make any deductions or additions based on the condition of the vehicle, such as high or low mileage or needed repairs. A private party value, or perhaps a ‘mid-book’ (averaging wholesale and retail) would be more appropriate for replacement value.

It would be ideal to have expert testimony at all §506(a)(2) valuation hearings, but, as the

court in *In re Gluek* said, “The Court finds that it would be prohibitively costly to require expert testimony for determination of value of every automobile in Chapter 13 proceedings.” *In re Gluek*, 233 B.R. at 519. The cost of an appraiser to the creditor could be more than any increase in value derived from such testimony, and the debtor generally does not have the extra funds necessary to hire an appraiser. Additionally, the necessity of presenting expert testimony in each case would greatly increase the length of Chapter 13 confirmation dockets. One can clearly understand, then, why the evidence presented is often simply “Blue Book” pages and the testimony of the debtor, unless the difference in value is significant enough to justify the cost of expert witnesses and lengthening the confirmation hearing.

THE TIMING OF THE VALUATION

Prior to the amendments of BAPCA, there was a split of authority as to when collateral should be valued under 11 U.S.C. §506: as of the filing of the case, or at confirmation, or at the time of the valuation hearing. The BAPCPA amendments were probably intended to end this controversy. In the first sentence of §506(a)(2), value shall be determined “based on the replacement value of such property *as of the date of the filing of the petition...*” §506(a)(2)(emphasis added). This is fairly straightforward. Clearly as to non-consumer debt in a personal Chapter 7 or 13, the relevant date for valuation is the filing of the petition.

The problem comes with the second sentence of §506(a)(2). That sentence deals with “property acquired for personal, family or household use,” and, as discussed above, value is to be “the price a retail merchant would charge for property of that kind, considering the age and condition of the property...” It is the next few words of that sentence, however, which cause the confusion. “... at the time value is determined.” §506(a)(2).

Courts examining the §506(a)(2) are split as to when ‘retail value’ (as we have defined it)

is determined. There is no question that ‘replacement value’ is determined as of the time of the filing of the petition. However, some courts have held that, as to goods acquired for personal, family or household use, the value is based on the date value is determined, be that the confirmation hearing or a hearing on a motion for valuation.

The two competing lines of thought are well represented by *In re Morales*, 387 B.R. 36 (Bankr.C.D.Cal. 2008)(holding that value is determined as of the petition date, even for consumer goods) and *In re Cook*, 415 B.R. 529 (Bankr.D.Kan. 2009)(holding that value of consumer goods is determined as of the date of the valuation hearing, not the filing of the petition).

In re Morales concerned a motion to redeem a motor vehicle. However, because §506(a)(2) covers both Chapter 7 and Chapter 13 cases, the analysis is the same as for the timing of a Chapter 13 valuation. *Morales* squarely addressed the issue of the time of valuation and recognized the potential confusion introduced into the statute by the phrase “at the time the value is determined”:

The new § 506(a)(2) also requires courts to determine the correct date of valuation, i.e., the date as of which the value of the property is to be calculated. The majority of courts to consider § 506(a)(2) have not expressly addressed this issue. At first glance, the date of valuation for personal property acquired for personal, family, or household use in individual Chapter 7 or Chapter 13 cases may appear readily ascertainable based on the plain language of the statute. A second glance, by contrast, reveals that § 506(a)(2) remains open to two plausible interpretations. See *In re Ortiz*, 2007 WL 1176019, at *2–3. The first sentence of § 506(a)(2) establishes that if the property is personal property in an individual Chapter 7 or Chapter 13 case then replacement value should be calculated “as of the date of the filing of the petition.” 11 U.S.C. § 506(a)(2). The second sentence, however, provides that if the property was acquired for personal, family, or household purposes, then “replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.” 11 U.S.C. § 506(a)(2) (emphasis added).

The issue is whether the clause “at the time value is determined” changes the date of valuation for property valued under the second sentence of § 506(a)(2). Courts must determine the proper interaction between the two sentences and set the correct date of valuation.

In re Morales, 387 B.R. at 43. *Morales* then went on to examine the competing cases examining

the issue, noting the two different interpretations of the last sentence of §506(a)(2): one interpretation which “reads the clause as referring back to the petition date standard of the first sentence, i.e., “at the time as of which value is determined.”“ *Id.* at 44, or the other interpretation which “reads the clause as referring to the date of the valuation hearing, i.e., “at the time value is determined by the court.”“ *Id.* After examining the case law and the legislative history, the court stated that, “Value should be calculated as of the petition date, not the valuation hearing.” *Id.* at 46.

In re Cook involved a valuation as part of a Chapter 13 cram down. The court in *Cook* examined *Morales*, stating, “The *Morales* court stated that this approach establishes a single, static date of valuation for all personal property in individual Chapter 7 and Chapter 13 cases and generally encourages the parties to determine value as promptly as possible.” It disagreed with *Morales*’ holding, however, stating, citing Keith M. Lundin, *Chapter 13 Bankruptcy*, 3d Ed. § 107.1 (2000 & Supp.2004):

As Judge Lundin writes in his treatise:

Logically, if the drafters intended property acquired for personal, family or household purposes to be valued at the petition, they would have used the same language in the second sentence as in the first sentence of new § 506(a)(2), or said nothing at all about timing in the second sentence. A convincing argument emerges that property acquired for personal, family or household purposes is valued as of whatever time value is determined and all other personal property is valued at the petition.

The Court notes that this view accords with that expressed in *Collier* and by other courts.

In re Cook, 415 B.R. at 533-534.

So, once again, an amendment to the statute which was apparently intended to make things clearer, muddled the waters. The authors would argue that §506(a)(2) makes clear that replacement value is determined “as of the date of the filing of the petition” and that since the second sentence goes on to define replacement value for personal, family or household goods, it is logical that “at

the time value is determined” means “the date of the filing of the petition.” This would avoid a rush to the courthouse by creditors whose collateral is depreciating and would avoid the problem of debtors delaying confirmation or valuation hoping for a lesser value as a result of depreciation.²²

VEHICLES - THE NADA BLUE BOOK AND OTHER MARKET GUIDES

Were we Chapter 11 practitioners, fighting over multi-million dollar pieces of real estate or pieces of equipment, every valuation hearing would include dueling expert appraisers.²³ However, in the nitty-gritty world of Chapter 13, where the differences in value could be a few hundred dollars or, at most, a few thousand dollars, the use of appraisers is often cost-prohibitive.

Therefore creditors, especially, often rely on market guides, the most common of which are the National Automobile Dealers Association (NADA) Guide and the Kelly Blue Book (KBB). As noted above, courts often cite one or both of these publications as the starting point for valuations. It is clear that the creditor (or debtor) may rely on these guides as competent evidence. “The National Automobile Dealers Association (NADA) guide, or a similarly recognized valuation source such as the Kelly Blue Book or the Black Book, would be acceptable and admissible under Rule 803(17) of the Federal Rules of Evidence.” *In re Bouzek*, 311 B.R. 239, 242 (Bankr.E.D.Wis. 2004)(citation omitted). Accord, *In re Roberts*, 210 B.R. 325 (Bankr.N.D.Iowa 1997):

Federal Rule of Evidence 803(17), provides that market reports or compilations generally relied upon by the public or by persons in particular occupations are not excluded by the hearsay rule. The NADA Blue Book has been found to fit within this exception to the hearsay rule. *In re Byington*, 197 B.R. 130, 138 (Bankr.D.Kan.1996). Another court has stated that the NADA publication is universally recognized as relevant and material evidence of the value of used cars.

²² As an aside, this does not always work in the debtor’s favor. When gas prices first hit \$4.00 per gallon, the price of large cars and pickup trucks plummeted as people traded in their ‘gas guzzlers.’ When gas prices fell again, the NADA values of these vehicles actually rose for a number of months.

²³ Valuation in Chapter 13 is, after all, “minor league” compared to valuations in Chapters 11 or 12. See, *In re Johnson*, 165 B.R. 524, 529 (S.D.Ga. 1994)

In re Marshall, 181 B.R. 599, 604 n. 9 (Bankr.N.D.Ala.1995). NADA values are widely used in the auto industry and the courts to simplify and expedite the valuation process. *In re Johnson*, 165 B.R. 524, 529 (S.D.Ga.1994). See also *In re Wierschem*, 152 B.R. 345, 347 (Bankr.M.D.Fla.1993) (taking judicial notice of the NADA values).

Id. at 330. See also, *In re Gonch*, 435 B.R. 857 (Bankr.N.D.N.Y. 2010) speaking about the admissibility of the Kelly Blue Book:

Federal Rule of Evidence 803(17) provides an exception to the hearsay rule for “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” *Fed.R.Evid.* 803; *Fed. R. Bankr.P.* 9017. “The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.” *Fed.R.Evid.* 803 *advisory committee's notes*. The public relies on Kelley Blue Book values to make informed car purchase decisions. The publishers of the Kelley Blue Book “know that their work will be consulted; if it is inaccurate, the public or the trade will cease consulting their product.” See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 575 n. 53 (D.Md.2007) (citation omitted). The court concludes that the Kelley Blue Book private party value falls squarely within the hearsay exception for commercial publications. See *Sovereign Bank, F.S.B. v. Finnegan (In re Finnegan)*, 358 B.R. 644, 649 (Bankr.M.D.Pa.2006) (collecting cases). Nothing before the court suggests that the document is not authentic. See *Fed.R.Evid.* 901(b)(4) (appearance, contents, substance, and distinctive characteristics of a document, taken in conjunction with circumstances, will authenticate it). In this case, the document bears the Kelley Blue Book logo and appears to be an exact photocopy of the guide book. The only alterations are two handwritten asterisks and a circle, indicating the location of the private party value of the Vehicle on the page. These facts, namely, that the pages were photocopied directly from the guide book, persuade the court of the document's authenticity.

Id. at 861-862.

One court even addressed the issue of which NADA guide to use, since there are different guides for different areas of the country. In *In re Farrell*, 71 B.R. 627 (Bankr.S.D.Iowa 1987), the vehicle was purchased in Wyoming but the debtor lived in Iowa. If repossessed, the creditor argued, the vehicle would be returned to Wyoming for sale. Wyoming is covered by the Mountain States Edition of the NADA. Iowa is covered by the Midwest Edition. The court held that the Midwest Edition should be used since valuation was to be made in light of the “proposed disposition or use

of the collateral.” Since the debtor’s use of the collateral was to drive it around Iowa, that state’s guide should be used.

Reliance solely on the NADA guide or the Kelly Blue Book has its problems, however. The *Roberts* court, after noting the admissibility of the KBB went on to caution:

Although these courts conclude that NADA Blue Book values constitute admissible evidence for purposes of valuation, they also recognize that the NADA values are not necessarily conclusive. Valuation of collateral is governed by § 506(a) which sets forth a flexible standard. Valenti, 105 F.3d at 62. Using an average of NADA values for a particular vehicle is a good guidepost which can account for the two considerations set out in § 506(a). Id. The NADA guidelines constitute some evidence of the value but are not conclusive. *In re Chrapliwy*, 207 B.R. 469, 474 (Bankr.M.D.N.C.1996). The NADA guide should be used in conjunction with expert testimony; use on its own is not favored. *Byington*, 197 B.R. at 138. Exclusive reliance on NADA's industry averages may contradict the court's duty under § 506(a) to value the specific collateral in the case before it. *Johnson*, 165 B.R. at 529.

In re Robert, 210 B.R. at 330-331.

Clearly, use of the NADA guide, Kelly Blue Book, or some other market guide, without other expert testimony, can be risky.²⁴ Further, if one side has an expert and the other relies only on the guide, the expert’s testimony generally will control. See, *In re Ruiz*, 227 B.R. 264 (Bankr.W.D.Tex. 1998); *In re Smith*, 42 B.R. 198 (Bankr.N.D.Ga. 1984). However, sometimes using the guide alone is the only economical choice available to a party.

REAL PROPERTY - APPRAISALS AND THE COUNTY TAX APPRAISAL DISTRICT

Given that debtors and creditor both often rely on the county appraisal district’s values for real property, and given that home mortgages on primary residences cannot be crammed down, it is perhaps no great surprise that valuation fights are rare with regard to real property. Almost every

²⁴ See, i.e., *Midwest Regional Credit Union v. De Anda–Ramirez (In re De Anda–Ramirez)*, 359 B.R. 794 (10th Cir. BAP 2007) which may have found that relying solely on Kelly Blue Book retail value was ‘no evidence.’

county's appraisal district is on-line and most list valuations for the property. A good place to start is the Texas Associate of Appraisal Districts website (www.taad.org/cad_web_links.html) which has links to almost every appraisal district in Texas. While the county appraisal district's value would not be conclusive, it would have probative value. See, *In re Amrco, Inc.*, 496 B.R. 442, 445 (Bankr.W.D.Tex. 2013) Even for real property which is not the primary residence, there are disincentives to trying to strip down a mortgage, since use of 11 U.S.C. §1325(a)(5)(ii) (payment of the value) instead of §1322(b)(5) (cure of default and maintenance) requires payment of the value, in full, over the life of the plan, instead of over the remaining life of the mortgage.

While mortgage companies might have old appraisals or Broker's Price Opinions in their files, but would still require expert testimony to get into evidence as they would not fall under the business records exception to the hearsay rule if they are used to establish the value of the property.

The mortgage company can request an appraisal. Bankruptcy Rule 7034 is made applicable to contested matter (which would include a Motion for Valuation) through Bankruptcy Rule 9014. This allows entry upon land for inspection. However, most mortgage companies are loath to spend the money for a professional appraisal in a consumer case. Therefore, use of appraisers is rare, although not unheard of.

OTHER TANGIBLE THINGS OF VALUE

There are, of course, a host of other things that can be valued in a consumer case: boats, dogs, clothing, guns, appliances, jewelry, springing executory interests. Practitioners should be aware that there are NADA Blue Books for Mobile Homes, Motorcycles, Boats, Classic Cars, Commercial Trucks, Farm Equipment, and Recreational Vehicles. As to other collateral, one potential place to start is based on the purchase price, less the standard depreciation used by insurance companies (see, i.e., www.claimspages.com/tools/depreciation). Of course, as to many

items, the value is such that it will not be worth fighting over.

Debtor's attorneys should be careful, however, in valuing certain non-necessary or luxury items such as boats, jewelry, etc. Remember that under 11 U.S.C. §362(d)(2) the court can terminate the automatic stay if the debtor does not have equity and such property is not necessary for an effective reorganization. If the debtor tries for too low a value with regard to a secured creditor's collateral in such items, the creditor may opt for a motion for relief from the automatic stay instead of trying to fight valuation in a confirmation context.

THE DEBTOR'S TESTIMONY AS TO VALUE

If it is cost prohibitive for a creditor to hire an appraiser for a valuation hearing, it is often even more so for the debtor in bankruptcy. Therefore, many debtor's attorneys rely on the common-law presumption that an owner is competent to testify as to the value of his own property. *See, Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007), "Courts indulge a common-law presumption that a property owner is competent to testify on the value of his own property. *See, e.g., North Carolina State Highway Comm'n v. Helderman*, 285 N.C. 645, 207 S.E.2d 720, 725 (1974); *Fed.R.Evid. 701 advisory committee's note* ("[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an [expert].... The amendment does not purport to change this analysis")." *See also, Asplundh Mfg. V. Benton Harbor Engineering*, 57 F.3d 1190 (3rd Cir. 1995), "Other examples of this type of quintessential Rule 701 opinion testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the value of one's property, and other situations in which the differences between fact and opinion blur and it is difficult or cumbersome for the examiner to elicit an answer from the witness that will not be expressed in the form of an opinion. *See generally Saltzburg, supra*,

1031-36; *Weinstein*, supra, ¶ 701[02]. These cases, it is important to add, all meet the core definitional terms of Rule 701-the opinion is based upon personal knowledge, is rationally based thereon, and is helpful to the trier of fact.” *See also, In re Stratton*, 248 B.R. 177 (Bankr. D.Mont. 2000) (Debtor, as owner, allowed to testify as to value of mobile home).

While an owner is indeed competent to testify as to value, quite often this testimony at a valuation hearing goes too far. First, an owner testifying as to value is not allowed to use such testimony to admit hearsay. For instance, many debtors will bring a ‘CarMax Appraisal’²⁵ and offer that as evidence. Or they will try and admit newspaper ads of ‘similar’ cars. However, one must remember that, as noted above, the debtor is testifying as a layman under Rule 701 FRE, not an expert under Rule 702 FRE. Rule 802 FRE, the hearsay rule, still applies. As the court noted in *In re Roberts*, 210 B.R. 325 (Bankr.N.D.Iowa 1997):

In *In re Applin*, 108 B.R. 253, 261 (Bankr.E.D.Cal.1989), the court considered whether to admit a real estate appraisal as evidence. It found that no hearsay exception applied and refused to admit the appraisal in support of a motion for relief from stay. *Id.* The court noted that the appraisal may have been admissible if it was supported by an affidavit or deposition testimony. *Id.*; Fed.R.Civ.P. 43(e) (applicable to bankruptcy cases through Fed. R. Bankr.P. 9017). In the end, the court refused to revisit the motion to give the creditor an opportunity to make a better evidentiary record. *Id.* at 262.

In a routinized area, such as bankruptcy motion practice, one easily loses sight of some of such basics as the need to make out a prima facie case by competent evidence. Bankruptcy litigation is no different than any other federal litigation practice in this respect. Although such evidentiary questions as the use of appraisals arise more frequently in bankruptcy courts than elsewhere because the issue of value of property is pervasive in bankruptcy, that does not excuse compliance with the Federal Rules of Evidence.

²⁵ A ‘CarMax Appraisal’ is a written offer to purchase the debtor’s vehicle, or setting a value for the debtor’s vehicle, from a dealer in the business of buying cars. In addition to the hearsay problem noted above, one must remember that such a ‘quote’ is generally an offer to purchase the vehicle by a dealer and thus is clearly wholesale value - and quite often a low-ball wholesale offer at that. Such a quote or appraisal would clearly not be what the debtor would have to pay for a vehicle (replacement value) or what a retail merchant would charge (retail value) since the dealer is going to sell the car for considerably more than it is offering to pay the debtor. That is how the dealers pay their overhead and make a profit.

Id. See also *In re Wilson*, 96 B.R. 301, 303 (Bankr.E.D.Cal.1989) (refusing to accept as evidence affidavit by attorney regarding mailing of complaint); *In re Missouri Flats Assocs.*, 86 B.R. 634, 638 (Bankr.E.D.Cal.1988) (ruling that unverified appraisals were inadmissible hearsay).

Id. at 329.

As the court noted in *Cunningham v. Masterwear Corp.*, 569 F.3d 673, 676 (7th Cir. 2009), “What the owner is not allowed to do is merely repeat another person's valuation, *United States v. 68.94 Acres of Land, supra*, 918 F.2d at 398, which was what [the property owner] wanted to do.” The owner is allowed to testify as to the value because it is assumed to be within his personal knowledge. *Id.* However, the debtor often does not have any personal knowledge of the *value* of his or her vehicle.²⁶ The debtor may have knowledge of the *condition* of the vehicle, but it may behoove the careful creditor to take the debtor on *voir dire* to test his or her actual knowledge of the value of the vehicle when the debtor attempts to testify to make sure that the debtor is not simply parroting values gleaned from others or from inadmissible hearsay sources.²⁷

Of note with regard to the debtor testifying as to value is *In re Brown*, 244 B.R. 603 (Bankr.W.D.Va. 2000). In *Brown*, the debtor wife of the purchaser of some furniture and appliances was allowed to testify as to its value based on the fact that her allegation that the property was owned jointly by her and her co-debtor husband was unchallenged. It therefore treated her as an ‘owner’ of the property and stated that, “It is generally, if not universally, accepted that an owner of property may testify as to his or her opinion of such property's value without demonstrating any

²⁶ It is interesting to note that the notes to Rule 701 FRE talk about allowing “the owner or officer of a business to testify to the value or the projected profits of a business, without the necessity of qualifying the witness as an accountant, appraiser or similar expert.” This is different from a debtor testifying as to the value of his or her car.

²⁷ See, i.e., *In re Winston*, 236 B.R. 167, 172 (Bankr.E.D.Pa. 1999)(“On the other hand, the Debtor’s valuation testimony, while competent as the car’s owner, see, e.g. *Kinter v. United States*, 156 F.2d 5, 7 (3rd Cir. 1946); and *Blakely, supra*, 76 B.R. at 469, is not worth a great deal. She was unable to quantify the effect of the Car’s mechanical and body problems upon its value. The Debtor’s testimony regarding the sales prices of allegedly comparable vehicles was vague and unconvincing. At bottom, she presented nothing but a wishful guess regarding the car’s value.”)

additional qualifications to give opinion evidence. *Justice v. Pennzoil Co.*, 598 F.2d 1339, 1344 (4th Cir.1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir.1975); *Neff v. Kehoe*, 708 F.2d 639 (11th Cir.1983); *Haynes v. Glenn*, 197 Va. 746, 91 S.E.2d 433 (1956). “In the absence of other evidence, the testimony of an owner may be conclusive, if it is credible.” *In re Cheltenham–Stenton Seafood, Inc.*, 1989 WL 62106 (Bankr.E.D.Pa.1989).” *Id.* at 611.

However, the court, after finding as noted above that the debtor had the burden of proof as to value, found that the debtor’s testimony was not credible and therefore did not meet the debtor’s burden of proof²⁸ sufficient to allow the debtors to cram down the secured claim, even though the debtor’s testimony was uncontroverted. The court stated that, “Even though her testimony as to valuation is admissible, it should be subject to the same type of critical analysis as would the testimony of an independent “expert”.” *Id.* at 612. Because the court found that there was no credible basis for the values the debtor gave, the debtor’s testimony was insufficient, even though uncontroverted, and confirmation was denied.

ADMISSIONS AS TO VALUE

When preparing for a valuation hearing, the careful practitioner should look for instances of the debtor or creditor alleging a different value from what is being proposed at the valuation hearing, especially for allegations of a higher value (for the debtor) or lower value (for the creditor) which may be admissions against interest or even binding judicial admissions.

First, a creditor should look to the debtor’s schedules. A motor vehicle, for instance, will often appear three different places in the schedules: on Schedule B - Personal Property, Para 25 - Automobiles, trucks, trailers, and other vehicles and accessories; Schedule C - Exemptions; and

²⁸ Which burden, the court found, was by a preponderance of evidence standard.

Schedule D - Secured Creditors. In all three places, the debtor is required to list values. All three should agree, but often they do not. Further, the incautious debtor will sometimes propose a plan which lists a value lower than that in the Schedules, or decide, after some reflection, that the collateral is worth less and so propose a lower value than that in the Schedules, without amending the Schedules. However, the values in the Schedules are a judicial admission. They may not be explained or controverted.

By executing the numerous Schedules that he filed under penalty of perjury—particularly the amended Schedules, which were filed after the Trustee began asking questions about issues not addressed in the initial Schedules—the Debtor represented to this Court that these values were accurate; therefore, he is estopped from denying their accuracy. *Jacobson*, 2006 WL 2796672, at *17 2006 U.S. Dist. LEXIS 70433, at *54 (“Statements in bankruptcy schedules are executed under penalty of perjury and when offered against a debtor are eligible for treatment as judicial admissions.... A judicial admission is binding on the party making it and judicial admission may not be explained or controverted.”); *Larson v. Groos Bank*, N.A., 204 B.R. 500, 501 (W.D.Tex.1996) (“Specifically, statements in bankruptcy schedules are executed under penalty of perjury and when offered against a debtor are eligible for treatment as judicial admissions.”)

In re Sissom, 366 B.R. 677, 697 (Bankr.S.D.Tex. 2007).²⁹

Plans filed earlier in the case and later amended can also be useful in examining the debtor with regard to his or her knowledge of the value of the collateral. If the value changes wildly, that can be brought out on *voir dire* of the debtor to show that the debtor does not have any personal knowledge of the value of the collateral, but relied simply on what he or she was told.

The new proof of claim form (Official Form B10) now has a blank for a secured creditor to fill in the “Value of the Property.” Clearly, the amount that the creditor puts in this blank will be an admission against interest. But is it binding? Arguably, it should not be. As the court noted in

²⁹ But see, *In re Hemisphere Intern. Center, Inc.*, 59 B.R. 289, 293 (Bankr.S.D.Fla. 1986)(holding that debtor was not bound by the value in its response to the motion for relief from stay, responses to interrogatories propounded in connection with that motion, or the original scheduled values since value is “determined on a case-by-case basis and a determination at one point of a case will not be binding at another point of the same case.”); *In re Atlanta West IV*, 91 B.R. 620 (Bankr.N.D.Ga. 1988)(Value in debtor’s schedules was not binding because the debtor stated this was the purchase price).

In re Simmons, 237 B.R. 672, 675 (Bankr.N.D.Ill. 1999), “Indeed, it seems somewhat inequitable to require [a division of a claim into secured and unsecured portions] absent some access to the collateral for appraisal purposes.” In order to avoid this trap, a secured creditor would perhaps best be advised to follow the advice of the *Simmons* court in its footnote 2 when it considered the new proof of claim which provides blank for value: “Presumably, if a creditor does not know or unsure of the collateral’s value, the creditor can simply indicate its lack of knowledge without compromising its secured claim.” *Id.* at fn 2.³⁰

Also as to creditors, an interesting place to find conflicting values is in motions for relief from stay. One of the oft-cited grounds in a motion for relief from stay is 11 U.S.C. 362(d)(2)(A) “the debtor does not have equity in such property.” The creditor is sometimes on the horns of a dilemma. In order to show no equity for a motion for relief, the creditor wants to establish a low value. But in the chapter 13 plan process, when determining the amount of the allowed secured claim, the creditor wants the highest value possible.³¹ The creditor can use two different values, however. Section 506(a)(1) provides: “Such value shall be determined in light of the purpose of such valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor’s interest.” Courts have recognized that value for purposed of the plan may be different than values for purposes of 11 U.S.C. §§361 or 362. *See, i.e. In re Fulcher*, 15 B.R. 446, 448 (Bankr.D.Kan. 1981)(“This value is for the purpose of establishing the amount of a claimant's secured claim, § 506(a), and does not preclude another and possibly different valuation at an earlier point in the proceeding to establish

³⁰ The authors use the phrase “to be determined” in the blank for value on the proof of claim for just this reason.

³¹ For an interesting example, see, *In re Labostrie*, 2012 WL 6554727 (9th Cir. BAP 2012) in which the creditor alleged a value of \$1,400 in its motion for relief from the automatic stay and alleged \$11,056 in opposition to the debtor’s motion to redeem. The 9th Cir. BAP said that bankruptcy court was not clearly erroneous in not holding the creditor to the \$1,400 value.

adequate protection under § 361 and § 362.”) See also, *In re Cason*, 190 B.R. 917 (Bankr.N.D.Ala. 1995):

The statute makes it clear that there can be several valuations in the course of a case. Thus, there could be a valuation for adequate protection purposes and also one for confirmation purposes. In *re Kennedy*, 177 B.R. 967 (Bankr.S.D.Ala.1995). The argument that the “valuation at the beginning of a case is cast in concrete and is the law of the case for all purposes not only defies logic but is clearly contrary to the specific language of § 506 of the Code.” In *re Woolley's Parkway Center, Inc.*, 147 B.R. 996, at 1002 (Bankr.M.D.Fla.1992). Nothing in § 506 mandates that the value of collateral be fixed in a single valuation for ALL purposes. Instead § 506 merely directs that valuations be made in light of the purpose of the valuation. In *re Landing Assoc., Ltd.*, 122 B.R. 288 (Bankr.W.D.Tex.1990).

Id. at 925.³²

VALUATION FROM A PREVIOUS CASE

What of serial filers? Does the value in a previous case have any bearing on the value in the current case? Can a debtor use (and thus depreciate) the motor vehicle in the first case, then file a subsequent case when the first case is dismissed and cram down the vehicle to the time of filing of the second case (or the time of the confirmation hearing, depending on the court’s view on the timing of the valuation)?

Pre-BAPCPA, there was a clear argument to be made that the debtor could not re-value the collateral in a subsequent case. See, *In re Garrison*, 19 B.R. 679 (Bankr.D.Kan. 1981):

The plan is not proposed in good faith. It would not preserve the integrity of the Bankruptcy Code to allow a chapter 13 debtor to use any goods until worn out and then dismiss the case, file a new chapter 13 petition and revalue the goods downward to avoid almost entirely the payment for the value of the goods as fixed in the first chapter 13 case. The Court therefore finds, under these circumstances, the instant plan is not proposed in good faith, and confirmation is denied.

³² The authors’ general practice, when dealing with this issue, is to allege in the Motion for relief from the automatic stay that there is no equity in the vehicle based on a liquidation value of the vehicle, if that is, in fact, the case. Where there is equity, even based on liquidation values, a creditor would be better off not asserting a lack of equity but relying on one of the other bases for a motion for relief from the automatic stay.

Id. at 681.

The reasoning in *Garrison*, however, was based on an aversion to serial filings. Has Congress, with the enactment of 11 U.S.C. §362(c)(3) and (4) implicitly allowed serial filings? Does this change the *Garrison* analysis? Arguably, good faith as to filing (which is determined to extend the stay or impose the stay in 11 U.S.C. §362(c)(3) or (4)) is different than the question of whether a plan is proposed in good faith. The reasoning is still valid. The debtor should not be able to “gain from his prior default.” *In re Thomas*, 123 B.R. 552, 554 (Bankr.W.D.Tex. 1991).

VALUATION WITH A CO-DEBTOR

One final interesting question with regard to valuation of motor vehicles. What if the debtor is not the sole owner of the collateral? What if there is a co-obligor? Can the court value the property under §506(a), have the debtor pay that amount through the plan, and then require the creditor to release its lien at discharge?

One court has said ‘no.’ The court in *In re Rodriguez*, 156 B.R. 659 (Bankr.E.D.Cal. 1993) considered the case where there was a co-obligor on debtor’s automobile. The court said:

Debtor has not submitted, nor has the court discovered, any authority which allows a debtor who is not the sole owner of the property to be valued to extinguish all of a secured creditor's rights in its collateral through the use of 11 U.S.C. § 506. Accordingly, the objection to the claim must be overruled and the claim allowed as filed.

The result of the court's ruling in this matter may appear at odds with the frequently applied bankruptcy principle that a debtor is permitted to acquire clear title to property when the debtor has paid to creditors (according to applicable priorities, if any) the value of the property.

But section 506 permits valuation only of the estate's interest in the property. If the debtor, as appears is the case here, has a 50% interest in the property, then the secured creditor has a secured claim as to the value of that 50% only—insofar as the debtor's interest is concerned—and an unsecured claim for the entire balance of the obligation.

This results in the creditor still having a secured claim in the full amount of the obligation as to the 50% of the property not belonging to the estate, but belonging to the co-owner/co-obligor. Where does such a confusion of rights and interests leave the parties involved? Pending a more insightful analysis not presently available to the court, the only logical result is to rule that a debtor holding only a fractional interest in property cannot utilize section 506 to value a secured claim.

Id. at 660. *Rodriguez* was distinguished by the 9th Circuit BAP, but only because in that case the property was community property and thus, the court said, the whole thing became property of the estate. *In re Maynard*, 264 B.R. 209 (9th Cir. BAP 2001).

Rodriguez was relied upon by the Court in *In re Solis*, 356 B.R. 398 (Bankr.S.D.Tex. 2006) in holding that, “The Court is not aware of any authority for bifurcation of a lien secured by property in which the estate holds only a nominal interest and for payment of the reduced claim in such a way that would eliminate the lien as it applies to the equitable interest owned by a non-debtor.” *Id.* at 413. In *Solis*, the mother tried to cram down the value of a car which she bought for her adult son because his credit was not sufficient to buy the car on his own. The court found that a plan seeking to do so was not proposed in good faith.

It is an interesting argument. Courts value vehicles with co-obligors all the time and creditors generally do not object. But perhaps they should. Further, debtors should be aware that there is case law to indicate that even if the debtor is successful in cramming down the value and interest rate in a Chapter 13 case where there is a co-debtor, that they may not receive their title at the end of the case following payment of all of the payments under the plan. See, i.e., *In re Faulkner*, 2013 WL 2154790 (Bankr.C.D.Ill. 2013).

MOTIONS FOR REDEMPTION UNDER 11 U.S.C. §722

Under 11 U.S.C. §722, the debtor may “redeem tangible personal property intended primarily for personal, family, or household use... by paying the holder of [a] lien the amount of the allowed

secured claim of such holder that is secured by such lien in full at the time of the redemption.” Again, the language is muddled as to the time of the valuation. As noted above, 11 U.S.C. §506(a)(2) states that valuation in an individual chapter 7 shall be replacement value as of the time of the filing of the petition, but that as to property acquired for personal, family, or household use - the very property a debtor can redeem - replacement value is the price a retail merchant would charge “at the time value is determined.” As cited above, *In re Morales*, 387 B.R. 36 and *In re Cook*, 415 B.R. 529 have come to opposite conclusions with regard to the timing of the valuation as to the property to be redeemed.

Because the language of § 506(a)(2) is arguably contradictory, the timing of determining the replacement value of collateral under § 722 is subject to some debate. See *In re Morales*, 387 B.R. at 43 (discussing cases holding that the petition date is the correct date to determine the replacement value, those holding that the date of the hearing on value is the valuation date, and holding that the petition date is the most appropriate date); but see 6 Collier on Bankruptcy ¶ 722.05[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed., 2012) (stating “most courts have held that, for purposes of redemption, valuation should ordinarily be as of the date of the redemption proceeding” and noting that conclusion is supported by the second sentence of § 506(a)(2)); *In re Cook*, 415 B.R. at 534 (disagreeing with *Morales* and stating that the appropriate time for determination of the replacement value is the time of the hearing on value).

In re Labostrie, 2012 WL 6554727 (9th Cir. B.A.P. 2012)[footnote omitted]. Note, however, that after recognizing the dispute, the 9th Circuit B.A.P. in *Labostrie* side-stepped the question by noting that both parties submitted evidence of value only as of the date of the hearing.

In a Chapter 7 proceeding, creditors would be well-advised to move quickly for relief from stay as to depreciating collateral when the debtor is not making adequate protection payments to forestall the question of the timing of valuation for a motion for redemption. If the creditor is receiving adequate protection payments, the harm to the creditor of a later valuation is considerably lessened, as the adequate protection payments should cover any decrease in value from the filing of the case to the time of the redemption hearing.

Note that BAPCPA made a change to 11 U.S.C. §348(f) such that the value in a Chapter 13 shall no longer apply when the case is converted to a Chapter 7. This would actually argue for the approach of *In re Cook*, because otherwise 11 U.S.C. §506 would seem to indicate that the redemption value in a Chapter 7 which was converted from a Chapter 13 would be the value as of the filing of the Chapter 13 petition, and thus the value in the Chapter 7 would be the same as the value in the Chapter 13 rendering the changes to §348(f) arguably superfluous.

CONCLUSION

The amendment to §506(a) was apparently intended to codify the Supreme Court's ruling in *Rash* and to bring some uniformity to valuations thereunder. If that was the plan, Congress failed miserably. Valuation is as muddled now as it was before BAPCPA. In fact, many courts apparently are valuing collateral under §506(a)(2) in exactly the same way they were before BAPCPA. This is not surprising given that they similarly did not change their valuation methods after the Supreme Court's ruling in *Rash*.

Reality dictates some shortcuts in Chapter 13 proceedings based on the very real financial constraints of the parties and the time constraints of the courts. But the goal should always be compliance with statutory mandates, even when formulating generally applicable shortcuts. Chapter 13 Trustees disburse millions of dollars annually to vehicle lenders. While the valuation difference may only be a few hundred or a few thousand dollars in each case, the cumulative effect of such differences is a significant amount of money annually.

APPENDIX C
TO THE LOCAL RULES OF THE SOUTHERN DISTRICT OF TEXAS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
DEBTOR.	§	CASE NO.
	§	
	§	
PLAINTIFF,	§	ADVERSARY NO.
v.	§	
	§	
DEFENDANT.	§	

STANDARD JOINT PRETRIAL STATEMENT

Under Local Bankruptcy Rule 7016 and Rule 6 of the Local Rules of the District Court, counsel shall file a joint pretrial statement setting forth these matters. Plaintiff is responsible for filing the jointly prepared pretrial statement. All counsel shall cooperate in its preparation.

1. **Statement of the Case.** Concise statement of the case for the convenience of the court.
2. **Jurisdiction.** Indicate any jurisdictional questions; state if core or noncore. If noncore, the parties must all state whether they consent to entry of final orders or judgment by the bankruptcy judge.
3. **Motions.** List all pending motions.
4. **Contentions of Parties.** State concisely in short separate paragraphs what each party claims.
5. **Admissions of Fact.** List all facts which have been stipulated or otherwise require no proof.
6. **Contested Issues of Fact.** List all facts in controversy that are necessary to the final disposition of this case.
7. **Agreed Applicable Propositions of Law.** List the legal propositions not in dispute.
8. **Contested Issue of Law.** State briefly the issues of law in dispute. Memoranda of authorities on each shall be filed by litigants with the joint pretrial order.
9. **Exhibits.** An Exhibit List numbering and briefly describing all exhibits to be offered in evidence or referred to in trial shall be attached to the joint pretrial statement. To the

greatest extent possible, exhibits at trial should be bound with the exhibit list as in inside cover sheet. All exhibits must be marked by the parties for identification before trial, designating such exhibits by the name of the offering party, followed by an exhibit number. (For example, "Plaintiff's Exhibit 1"). ALL EXHIBITS WILL BE ADMITTED INTO EVIDENCE BY AGREEMENT OF COUNSEL AS THE FIRST ITEM OF BUSINESS AT TRIAL. Counsel for all parties are ordered to confer at their earliest convenience for the purpose of arriving at all possible stipulations and for the exchange of documents which will be offered in evidence at the trial. Documents or physical evidence not listed in the joint pretrial statement or produced to opposing counsel before the pretrial conference date will be inadmissible for any purpose during trial, except upon motion and leave. This shall not apply to rebuttal exhibits which cannot be anticipated. Objections to admissibility will be taken up at the pretrial conference. Supporting legal authorities and copies of exhibits in dispute shall be submitted to the court at least three business days before the pretrial conference. Counsel is encouraged to utilize the Court's electronics systems for the presentation of exhibits.

10. **Witnesses.** Each party should list the names and addresses of all witnesses expected to be called during trial with a brief statement of the facts expected to be proved by each witness. Counsel are expected to stipulate to the qualifications of experts. Inability to stipulate must be in the pretrial statement and specifically brought to the court's attention for resolution prior to trial. The proponent of a witness must state the amount of courtroom time needed for direct examination. The opponent must state the amount of courtroom time needed for cross examination of that witness. Failure to provide any of this information may result in counsel's inability to call or examine that witness for testimony at trial. This does not apply to rebuttal or impeachment witnesses.

11. **Settlement.** Report prospects of settlement. Counsel are expected to provide the Court with an analysis of those areas in dispute continuing to exist.

12. **Estimated Trial Time.** A statement of the estimated time to try the proceedings, and a statement as to availability of witnesses, including out of state witnesses.

13. **Attachments.** Include these required attachments for each party:

- A. Proposed findings of fact and conclusions of law, with supporting authorities in a memorandum of law;
- B. Exhibit Lists:
 - i. 5 paper copies if exhibits will not be electronically presented; or
 - ii. 1 paper copy for Court if exhibits will be electronically presented.
- C. Objections to Exhibits (2 copies); and
- D. Witness Lists (2 copies).

Counsel for Plaintiff

Counsel for Defendant

APPENDIX E
TO THE LOCAL RULES OF THE SOUTHERN DISTRICT OF TEXAS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
DEBTOR.	§	CASE NO.
	§	
PLAINTIFF,	§	
v.	§	ADVERSARY NO.
	§	
DEFENDANT.	§	

COMPREHENSIVE SCHEDULING, PRE-TRIAL AND TRIAL ORDER

A pretrial conference was held on _____. The parties submitted a Rule 26 Report:

- A. _____ which is attached and is accepted by the Court except as modified by this order; or
- B. _____ which is filed at docket # ____ and is accepted by the Court except as modified by this order.

Under authority of Fed. R. Bankr. P. 7016 and Fed. R. Civ. P. 16, it is hereby **ORDERED** that the following deadlines and settings shall apply in the above referenced adversary:

1. All discovery in this case must be completed on or before_____.
2. The party with the burden of proof on an issue must serve its expert reports no later than _____. Rebuttal expert reports must be served no later than _____.
3. Dispositive motions may not be filed after _____. Any responses to dispositive motions must be filed within 20 days after a dispositive motion is filed. The Court additionally orders:
 - A. _____ Courtesy copies of dispositive motions and responses must be mailed or delivered to the Court's chambers when they are filed with the Clerk.

B. _____ Dispositive motions may not be filed until discovery is completed.

4. Witness and Exhibit Lists must be exchanged at least 2 working days prior to the face to face meeting required in the following paragraph. Copies of the exhibits shall be attached to the Exhibit List.

5. Counsel must meet face to face to attempt to resolve these issues amicably, to attempt to stipulate to as many facts and issues as possible, and to prepare the pretrial order. This face to face meeting must occur prior to _____. The court intends that this will be a substantive, good faith effort to resolve issues. Therefore trial counsel (lead counsel) are required to attend this meeting in person. Counsel who are not present at this meeting may not be permitted to participate in the trial.

6. The parties must jointly prepare and file a proposed form of pretrial statement not later than _____. The proposed form of statement must be signed by counsel for both parties and must be in the form set forth as Appendix C on the Court's website.

7. Copies of exhibits must be attached to the pretrial statement. Relevant portions of lengthy exhibits must be highlighted. Counsel must also attach succinct memoranda on disputed issues of law. A courtesy copy of the pretrial order must be delivered to chambers when the pretrial order is filed with the clerk.

8. A Pre-Trial Conference will:

A. _____ Not be held.

B. _____ Be held on _____ at _____.m. Attendance by all parties is required, either in proper person (if not represented by counsel) or by an attorney who has authority to bind the party. Each party must have a representative present with full settlement authority.

9. Trial of this adversary proceeding will commence on _____ at _____.m. It is estimated that trial can be completed in _____ hours of trial time.

IT IS FURTHER:

ORDERED that changes to this Scheduling Order may only be made by further order of this Court. A motion to extend any deadline and/or alter any hearing date will only be granted for good cause shown beyond the control of the lawyers and/or parties and only in very limited circumstances.

SIGNED:

UNITED STATES BANKRUPTCY JUDGE

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS	DEFENDANTS	
ATTORNEYS (Firm Name, Address, and Telephone No.)	ATTORNEYS (If Known)	
PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <p>FRBP 7001(a) – Recovery of Money/Property</p> <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other </div> <div style="width: 48%;"> <p>FRBP 7001(f) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 48%;"> <p>FRBP 7001(b) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property</div> <div style="width: 48%;"> <p>FRBP 7001(g) – Injunctive Relief</p> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 48%;"> <p>FRBP 7001(c) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h)</div> <div style="width: 48%;"> <p>FRBP 7001(h) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 48%;"> <p>FRBP 7001(d) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e)</div> <div style="width: 48%;"> <p>FRBP 7001(i) Declaratory Judgment</p> <input type="checkbox"/> 91-Declaratory judgment </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 48%;"> <p>FRBP 7001(e) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation</div> <div style="width: 48%;"> <p>FRBP 7001(j) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 48%;"> <p>FRBP 7001(f) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <p style="text-align: center;">(continued next column)</p> </div> <div style="width: 48%;"> <p>Other</p> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case) </div> </div>		
<input type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$	
Other Relief Sought		

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR		BANKRUPTCY CASE NO.
DISTRICT IN WHICH CASE IS PENDING	DIVISION OFFICE	NAME OF JUDGE
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF)		
DATE		PRINT NAME OF ATTORNEY (OR PLAINTIFF)

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

141 S.Ct. 585
208 L.Ed.2d 384

CITY OF CHICAGO, ILLINOIS, Petitioner

v.

Robbin L. FULTON, et al.

No. 19-357

Supreme Court of the United States.

Argued October 13, 2020

Decided January 14, 2021

Mark A. Flessner, Benna Ruth Solomon, Myriam Zreczny Kasper, Ellen W. McLaughlin, City of Chicago, Office of Corporation Counsel, Chicago, IL, Craig Goldblatt, Danielle Spinelli, Joel Millar, Isley Gostin, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, Allyson M. Pierce, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, for Petitioner.

Catherine Steege, Adam T. Swingle, Jenner & Block LLP, Chicago, IL, Eugene R. Wedoff, Counsel of Record, Carl Wedoff, Jenner & Block LLP, New York, NY, John P. Wonais, Michael A. Miller, The Semrad Law Firm LLC, Chicago, IL, for Respondents.

Justice ALITO delivered the opinion of the Court.

[141 S.Ct. 589]

When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum. *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. ----, ---- - ----, 140 S.Ct. 582, 588–589, 205 L.Ed.2d 419 (2020). Those prohibited efforts include "any act ... to exercise control over property" of the bankruptcy estate. 11 U.S.C. § 362(a)(3). The question in this case is whether an entity violates that prohibition by retaining possession of a debtor's property after a bankruptcy petition is filed. We hold that mere retention of property does not violate § 362(a)(3).

I

Under the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences. For one thing, a petition "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." § 541(a)(1). Section 541 "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). One such provision, § 542, is important for present purposes. Titled "Turnover of property to the estate," § 542 provides, with just a few exceptions, that an entity (other than a custodian) in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property.

A second automatic consequence of the filing of a bankruptcy petition is that, with certain exceptions, the petition "operates as a stay, applicable to all entities," of efforts to collect from the debtor outside of the bankruptcy forum. § 362(a). The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others. Under the Code, an individual injured by any willful violation of the stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." § 362(k)(1).

Among the many collection efforts prohibited by the stay is "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate ." § 362(a)(3) (emphasis added). The prohibition against exercising control over estate property is the subject of the present dispute.

In the case before us, the city of Chicago (City) impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition

and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Court of Appeals affirmed all of the judgments in a consolidated opinion. *In re Fulton*, 926 F.3d 916 (CA7 2019). The court concluded that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City had acted "to exercise control over" respondents' property in violation of § 362(a)(3). *Id.*, at 924–925. We granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a

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bankruptcy estate violates § 362(a)(3).¹ 589 U.S. ———, 140 S.Ct. 680, 205 L.Ed.2d 449 (2019). We now vacate the judgment below.

II

The language used in § 362(a)(3) suggests that merely retaining possession of estate property does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms—"stay," "act," and "exercise control"—is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed ... ; a deed." *Black's Law Dictionary* 30 (11th ed. 2019); see also *Webster's New International Dictionary* 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." *Webster's Third New*

International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." *Webster's New International Dictionary*, at 892. The suggestion conveyed by the combination of these terms is that § 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.

We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents. As respondents point out, omissions can qualify as "acts" in certain contexts, and the term "control" can mean "to have power over." *Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699, 702 (CA7 2009) (quoting *Merriam-Webster's Collegiate Dictionary* 272 (11th ed. 2003)). But saying that a person engages in an "act" to "exercise" his or her power over a thing communicates more than merely "having" that power. Thus the language of § 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision.

Any ambiguity in the text of § 362(a)(3) is resolved decidedly in the City's favor by the existence of a separate provision, § 542, that expressly governs the turnover of estate property. Section 542(a), with two exceptions, provides as follows:

"[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

The exceptions to § 542(a) shield (1) transfers of estate property made from one entity to another in good faith without notice or knowledge of the bankruptcy petition

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and (2) good-faith transfers to satisfy certain life insurance obligations. See §§ 542(c), (d). Reading § 362(a)(3) to cover mere retention of property, as respondents advocate, would create at least two serious problems.

First, it would render the central command of § 542 largely superfluous. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Yates v. United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (plurality opinion; internal quotation marks and brackets omitted). Reading "any act ... to exercise control" in § 362(a)(3) to include merely retaining possession of a debtor's property would make that section a blanket turnover provision. But as noted, § 542 expressly governs "[t]urnover of property to the estate," and subsection (a) describes the broad range of property that an entity "shall deliver to the trustee." That mandate would be surplusage if § 362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.

Respondents and their *amici* contend that § 542(a) would still perform some work by specifying the party to whom the property in question must be turned over and by requiring that an entity "account for ... the value of " the debtor's property if the property is damaged or lost. But that is a small amount of work for a large amount of text in a section that appears to be the Code provision that is designed to govern the turnover of estate property. Under this alternative interpretation, § 362(a)(3), not § 542, would be the chief provision governing turnover—even though § 362(a)(3) says nothing expressly on that question. And § 542 would be reduced to a footnote—even though it appears on its face to be the governing provision. The better account of the two provisions is that § 362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy

process to draw far-flung estate property back into the hands of the debtor or trustee.

Second, respondents' reading would render the commands of § 362(a)(3) and § 542 contradictory. Section 542 carves out exceptions to the turnover command, and § 542(a) by its terms does not mandate turnover of property that is "of inconsequential value or benefit to the estate." Under respondents' reading, in cases where those exceptions to turnover under § 542 would apply, § 362(a)(3) would command turnover all the same. But it would be "an odd construction" of § 362(a)(3) to require a creditor to do immediately what § 542 specifically excuses. *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995). Respondents would have us resolve the conflicting commands by engrafting § 542's exceptions onto § 362(a)(3), but there is no textual basis for doing so.

The history of the Bankruptcy Code confirms what its text and structure convey. Both § 362(a)(3) and § 542(a) were included in the original Bankruptcy Code in 1978. See Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595. At the time, § 362(a)(3) applied the stay only to "any act to obtain possession of property of the estate or of property from the estate." *Id.*, at 2570. The phrase "or to exercise control over property of the estate" was not added until 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 371.

Respondents do not seriously dispute that § 362(a)(3) imposed no turnover obligation prior to the 1984 amendment. But

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transforming the stay in § 362 into an affirmative turnover obligation would have constituted an important change. And it would have been odd for Congress to accomplish that change by simply adding the phrase "exercise control," a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in § 542. Had Congress

wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a crossreference or provide any other indication that it was transforming § 362(a)(3). The better account of the statutory history is that the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property.

* * *

Though the parties debate the issue at some length, we need not decide how the turnover obligation in § 542 operates. Nor do we settle the meaning of other subsections of § 362(a).² We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BARRETT took no part in the consideration or decision of this case.

Justice SOTOMAYOR, concurring.

Section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay" of "any act ... to exercise control over property of the [bankruptcy] estate." 11 U.S.C. § 362(a)(3). I join the Court's opinion because I agree that, as used in § 362(a)(3), the phrase "exercise control over" does not cover a creditor's passive retention of property lawfully seized prebankruptcy. Hence, when a creditor has taken possession of a debtor's property, § 362(a)(3) does not require the creditor to return the property upon the filing of a bankruptcy petition.

I write separately to emphasize that the Court has not decided whether and when § 362(a)'s other provisions may require a creditor to return a debtor's property. Those provisions stay, among other things, "any act to create, perfect, or enforce any lien against property of the estate" and "any act to collect, assess, or recover a claim against [a] debtor" that arose prior to bankruptcy proceedings. §§ 362(a)(4), (6) ; see, e.g., *In re Kuehn* , 563 F.3d 289, 294 (CA7 2009) (holding that a university's refusal to provide a transcript to a student-debtor "was an act to collect a debt" that violated the automatic stay). Nor has the Court addressed how bankruptcy courts should go about enforcing creditors' separate obligation to "deliver" estate property to the trustee or debtor under § 542(a). The City's conduct may very well violate one or both of these other provisions. The Court does not decide one way or the other.

Regardless of whether the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly

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comports with its spirit. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' ' ' to debtors. *Marrama v. Citizens Bank of Mass.* , 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (quoting *Grogan v. Garner* , 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). When a debtor files for Chapter 13 bankruptcy, as respondents did here, "the debtor retains possession of his property" and works toward completing a court-approved repayment plan. 549 U.S. at 367, 127 S.Ct. 1105. For a Chapter 13 bankruptcy to succeed, therefore, the debtor must continue earning an income so he can pay his creditors. Indeed, Chapter 13 bankruptcy is available only to "individual[s] with regular income." 11 U.S.C. § 109(e).

For many, having a car is essential to maintaining employment. Take, for example, respondent George Peake. Before the City seized his car, Peake relied on his 200,000-mile 2007 Lincoln MKZ to travel 45 miles each day from his home on the South Side of Chicago to his job in Joliet,

Illinois. In June 2018, when the City impounded Peake's car for unpaid parking and red-light tickets, the vehicle was worth just around \$4,300 (and was already serving as collateral for a roughly \$7,300 debt). Without his car, Peake had to pay for rides to Joliet. He filed for bankruptcy, hoping to recover his vehicle and repay his \$5,393.27 debt to the City through a Chapter 13 plan. The City, however, refused to return the car until either Peake paid \$1,250 upfront or after the court confirmed Peake's bankruptcy plan. As a result, Peake's car remained in the City's possession for months. By denying Peake access to the vehicle he needed to commute to work, the City jeopardized Peake's ability to make payments to *all* his creditors, the City included. Surely, Peake's vehicle would have been more valuable in the hands of its owner than parked in the City's impound lot.¹

Peake's situation is far too common.² Drivers in low-income communities across the country face similar vicious cycles: A driver is assessed a fine she cannot immediately pay; the balance balloons as late fees accrue; the local government seizes the driver's vehicle, adding impounding and storage fees to the growing debt; and the driver, now without reliable transportation to and from work, finds it all but impossible to repay her debt and recover her vehicle. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 11–16, 31–32. Such drivers may turn to Chapter 13 bankruptcy for a "fresh start." *Marrama*, 549 U.S. at 367, 127 S.Ct. 1105 (internal quotation marks omitted).³ But without their vehicles, many debtors quickly find themselves unable to make their Chapter 13 payments. The cycle thus continues, disproportionately burdening communities

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of color, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 17, and interfering not only with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities.

Although the Court today holds that § 362(a)(3) does not require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors' vehicles to their owners. Most obviously, the Court leaves open the possibility of relief under § 542(a). That section requires any "entity," subject to some exceptions, to turn over "property" belonging to the bankruptcy estate. 11 U.S.C. § 542(a). The debtor, in turn, must be able to provide the creditor with "adequate protection" of its interest in the returned property, § 363(e); for example, the debtor may need to demonstrate that her car is sufficiently insured. In this way, § 542(a) maximizes value for all parties involved in a bankruptcy: The debtor is able to use her asset, which makes it easier to earn an income; the debtor's unsecured creditors, in turn, receive timely payments from the debtor; and the debtor's secured creditor, for its part, receives "adequate protection [to] replace the protection afforded by possession." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 207, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). Secured creditors cannot opt out of this arrangement. As even the City acknowledges, § 542(a) "impose[s] a duty of turnover that is mandatory when the statute's conditions ... are met." Brief for Petitioner 37.

The trouble with § 542(a), however, is that turnover proceedings can be quite slow. The Federal Rules of Bankruptcy Procedure treat most "proceeding[s] to recover ... property" as "adversary proceedings." Rule 7001(1). Such actions are, in simplified terms, "essentially full civil lawsuits carried out under the umbrella of [a] bankruptcy case." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 505, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015). Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days. See Administrative Office of the United States Courts, Time Intervals in Months From Filing to Closing of Adversary Proceedings Filed Under 11 U.S.C. § 542 for the 12-Month Period Ending June 30, 2020, Washington, DC: Sept. 25, 2020.

One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments. To address this problem, some courts have adopted strategies to hurry things along. At least one bankruptcy court has held that § 542(a)'s turnover obligation is automatic even absent a court order. See *In re Larimer*, 27 B.R. 514, 516 (Bankr. D Idaho 1983). Other courts apparently will permit debtors to seek turnover by simple motion, in lieu of filing a full adversary proceeding, at least where the creditor has received adequate notice. See Tr. of Oral Arg. 81 (counsel for the City stating that "[i]n most bankruptcy courts, if a creditor responds to a motion [for turnover] by" arguing that the debtor should have instituted an adversary proceeding, the bankruptcy judge will ask whether the creditor received "actual notice"); Brief for United States as *Amicus Curiae* 32 (reporting that "some courts have granted [turnover] orders based solely on a motion"); but see, e.g., *In re Denby-Peterson*, 941 F.3d 115, 128–131 (CA3 2019) (holding that debtors must seek turnover through adversary proceedings). Similarly, even when a turnover request does take the form of an

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adversary proceeding, bankruptcy courts may find it prudent to expedite proceedings or order preliminary relief requiring temporary turnover. See, e.g., *In re Reid*, 423 B.R. 726, 727–728 (Bkrtcy. Ct. ED Pa. 2010); see generally 10 Collier on Bankruptcy ¶ 7065.02 (16th ed. 2019).

Ultimately, however, any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges. It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned. Congress, too, could offer a statutory fix, either by ensuring that expedited review is available for § 542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that

require creditors to return cars to debtors in a timely manner.

Nothing in today's opinion forecloses these alternative solutions. With that understanding, I concur.

Notes:

¹ Compare *In re Fulton*, 926 F.3d 916, 924 (CA7 2019), *In re Weber*, 719 F.3d 72, 81 (CA2 2013), *In re Del Mission Ltd.*, 98 F.3d 1147, 1151–1152 (CA9 1996), and *In re Knaus*, 889 F.2d 773, 774–775 (CA8 1989), with *In re Denby-Peterson*, 941 F.3d 115, 132 (CA3 2019), and *In re Cowen*, 849 F.3d 943, 950 (CA10 2017).

² In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also had violated §§ 362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F.3d at 926, n. 1. Neither do we.

³ Even though § 362(a)(3) does not require turnover, whether and when the City may sell impounded cars is an entirely different matter. See, e.g., *In re Cowen*, 849 F.3d 943, 950 (CA10 2017) ("It's not hard to come up with examples of ... 'acts' that 'exercise control' over, but do not 'obtain possession of,' the estate's property, e.g., a creditor in possession who improperly sells property belonging to the estate").

⁴ See, e.g., Ramos, Chicago Seized and Sold Nearly 50,000 Cars Over Tickets Since 2011, Sticking Owners With Debt, WBEZ News (Jan. 7, 2019) (online source archived at www.supremecourt.gov).

⁵ The 10-year period from 2007 to 2017, for instance, saw a tenfold increase in the number of Chicagoans filing Chapter 13 bankruptcies that involved debt to the City. See Sanchez & Kambhampati, Driven Into Debt: How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy, ProPublica Illinois (Feb. 27, 2018)

(online source archived at
www.supremecourt.gov).

Non-Dischargeability and the Implications of Bartenwerfer v. Buckley

Exploring the Supreme Court's Decision
and Broader Applications

SDTX Consumer Bankruptcy Conference
January 16, 2024

Introduction

- What does the Supreme Court's decision in *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023) mean for your everyday practice?
- Does it expand interpretation of non-dischargeability under 11 U.S.C. § 523(a)?
- What are the broader implications for partnerships, agency relationships, and joint liability in bankruptcy cases?

Facts of *Bartenwerfer v. Buckley*

- Kate Bartenwerfer and her boyfriend (later husband) formed a legal partnership.
- Husband managed the renovation project, hired contractors, and signed checks.
- Both attested to full disclosure during the home sale.
- Buyer discovered defects, sued, and was awarded damages exceeding \$200,000 in California state court
- Kate filed for Chapter 7 relief
- Court found Kate neither knew nor should have known of the fraud

Supreme Court Holding in *Bartenwerfer*

- Key Holding:
 - § 523(a)(2)(A) may preclude discharge of debts for money obtained by fraud, regardless of the debtor's knowledge of or involvement in the fraud
- Reasoning:
 - Statute focuses on the nature of the debt, not the actor who personally perpetrated the fraud.
 - Liability depends on state partnership and agency laws.

Procedural History of *Bartenwerfer*

- Bankruptcy Court: Debt deemed non-dischargeable under § 523(a)(2)(A) via partnership liability.
- BAP: remanded to determine if Kate had knowledge of the fraud.
 - On remand, Bankruptcy Court found lack of knowledge and permitted discharge. BAP affirmed.
- Ninth Circuit: reversed and denied discharge, emphasizing partnership liability.
- Supreme Court: Expanded non-dischargeability to include vicarious liability.

Broader Implications of *Bartenwerfer*

- Non-dischargeability of joint liabilities in partnerships and agency relationships
- Increased litigation risks for debtors when creditors are challenging dischargeability
- Liability depends on state law definitions of partnerships and agencies

Case 1: *In re Desouza*, 659 B.R. 288 (Bankr. E.D. Tex. 2024)

- Facts:
 - Creditor entered into financing agreement with dealership owned by the debtor
 - Creditor sought non-dischargeability under § 523(a)(2)(A) and (a)(4), alleging that debtor used fraud to obtain the financing agreement and embezzled collateral
- Holding:
 - Genuine issue of fact remained as to whether, under state law, debtor had agents or partners and if so whether they had acted in scope of their authority to commit fraud or embezzlement
- Key Principles:
 - Liability depends on state laws defining partnerships and agencies.

Case 2: *In re Poe*, 2023 WL 4359972, 21-01032-KHK (Bankr. E.D. Va. July 5, 2023)

- Facts:
 - Public agency sought non-dischargeability under § 523(a)(2)(A), (a)(4) and (a)(6) for director's fraud.
 - Alleged that debtor conspired with director of public agency to convert its property
- Holding:
 - Debt was dischargeable because no agency relationship existed between debtor and the director
- Key Principle:
 - Liability requires an agency or partnership relationship under state law.

Case 3: *In re Sharp*, 2024 WL 2819674, 22-03039 (Bankr. N.D. Ohio June 3, 2024)

- Facts:
 - Debtor's wife embezzled funds; creditor sought non-dischargeability under § 523(a)(2)(A), (a)(4), and (a)(6)
 - State court held debtor and wife jointly and severally liable for damages to the creditor.
- Holding:
 - Debt was dischargeable because state court judgement did not contain findings to show vicarious liability
- Key Principle:
 - When relying on state court judgement, judgment must have specific finding of vicarious liability
 - *Bartenwerfer* rationale applies to § 523(a)(4)

Case 4: *In re Zolnier*, 2024 WL 206357, 16-3156 (Bankr. S.D. Tex., January 18, 2024)

- Facts:
 - Creditor brought an adversary proceeding seeking to have married couple's discharge revoked under § 727(d)(1) for false statements made in their schedules
- Holding:
 - Court found that the false statements were made with fraudulent intent by the husband-debtor and that the reasoning in *Bartenwerfer* precluded the revocation of the discharge to being limited to the husband-debtor and that the discharge would be revoked as to both debtors.
- Key Principle:
 - *Bartenwerfer* non-dischargeability applies to joint filings when fraud is found under § 727(d)(1)

Case 5: *In Re Hann*, 2023 WL 6803541, 22-20407 (5th Cir. Oct. 16, 2023)

- Facts:
 - Debtor used draw requests for a residential construction project fraudulently, leading to liability for his company's actions
- Holding:
 - Debt was non-dischargeable under § 523(a)(2)(A) as debtor was found personally liable by an arbitrator for the fraudulent misrepresentations of his company through alter ego theory
- Key Principle:
 - *Bartenwerfer* non-dischargeability extends to corporate misrepresentations if alter ego applies.

Case 6: *In re Csigi*, 2024 WL 5165186, 23-90019 (Bankr. D. Haw. Dec. 17, 2024)

- Facts
 - Wife, who was trustee of a trust for the benefit of her mother, was found liable for misappropriating trust funds
 - In wife's previous bankruptcy, debt was held non-dischargeable under § 523(a)(4)
- Holding
 - In husband's own bankruptcy, court held that husband also owed debt to the trust under unjust enrichment because husband benefited from wife's misappropriations of funds
 - Husband's debt was non-dischargeable under § 523(a)(4) because the underlying debt was "for" the wife's fiduciary defalcation
- Key principle
 - *Bartenwerfer* non-dischargeability may apply where there is no finding of agency or partnership

Conclusion and Key Takeaways

- *Bartenwerfer v. Buckley* broadens the scope of non-dischargeability under § 523
- Liability depends on state laws defining partnerships, agencies, and joint liability
- Professionals should evaluate risks in joint ventures and partnerships
- Case law highlights evolving interpretations of bankruptcy provisions